Petition

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In The

Supreme Court of the United States

October Term, 1981

400 E. BALTIMORE STREET, INC., BLOCK NEWS, INC., PHILLIP DAVID LONG, THOMAS F. CRAIG, JOSEPH D. STEPHENS, DAVID THOMAS STOUGHTON, CHARLES BOOKS, INC., DEBORAH RAYOLA REDDING a/k/a DEBORAH RAYOLA PIERCE,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

I. Is Maryland Ann. Code Article 27, Section 423 void for vagueness as it fails to provide the procedure or method a person *must* follow in an effort to bring themselves within the confines of its exemption provisions, thereby denying equal protection and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution?

II. Did the Court of Special Appeals erroneously find that the mere posting, around a store located in an "adult entertainment area" and loaded primarily with sexually explicit material, of signs indicating that material sold in the store was sold exclusively for scientific, educational or governmental purposes hardly suffices to make Section 423 applicable as a matter of law?

III. Does Article 27, Section 423 create an arbitrary and capricious classification, thereby denying equal protection of the law and due process of law?

IV. Is Article 27, Section 418 inoperable and unenforceable because on its face it recognizes, by virtue of Section 423, that obscene material has scientific, educational, governmental or other similar justification? Some of the elements that the Supreme Court in *Miller v. California* mandated material cannot possess in order to come within the ambit of the First Amendment.

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vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

OPINION BELOW

On June 8, 1981, the Court of Special Appeals of Maryland filed a reported opinion reversing the decision of the Criminal Court of Baltimore. The Honorable Albert M. Figinski presided at the trial in the Criminal Court. The Court of Special Appeals

reversed petitioners' convictions herein because an "error in trial procedure . . . the failure to make a necessary finding" *i.e.*, the finding of obscenity. The reported opinion of the Court of Special Appeals, dated June 8, 1981, is printed in the appendix, *infra* at page 1a. The cases were removed for retrial. In addition, under "other issues", pursuant to Maryland Rule 1085, the Court of Special Appeals addressed for the guidance of the trial court, constitutional defenses made by petitioners to their prosecutions. It was from this portion of the Court of Special Appeals opinion that the petitioners sought review by the Court of Appeals of Maryland.

A petition for writ of certiorari was timely filed by the petitioner to the Court of Appeals of Maryland. The Court of Appeals, by written order, denied the petition for writ of certiorari on September 9, 1981. The order of denial is not reported and without opinion and is set out in the appendix (30a).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on September 9, 1981, and the judgment was thus final. The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Maryland Code, Article 27, Sections 418, 423 are set forth in the appendix (31a).

STATEMENT OF THE CASE

The petitioners' cases proceeded to trial on a statement of facts and proffers of testimony after pleas of not guilty and waiver of a jury trial on statements of charges, charging the sale and distribution of obscene publications in violation of Article 27, Section 418. The statement of facts submitted to the trial court for consideration was as follows:

Plainclothed policemen proceeded into the bookstores of the corporate petitioners where the individual petitioners were employed and selected certain publications which were wrapped in cellophane. The selections of the police officers were made without any help from the petitioners. After selecting the publication of their choice, the officers took them to the cash registers where individual petitioners were located and paid for the same with cash from police funds, without discussion of the purpose for the purchase. After the purchase, the publications were taken to a judge, removed from the cellophane wrappers and found to be obscene by said judge. As a result, warrants were issued for petitioners and they were arrested. The statement of facts further revealed that throughout the store there were posted signs stating "that the material sold in the store is sold only for scientific, educational, governmental or other similar justification." In addition, at the cash register where the police paid for the publications selected by them, there appeared a sign that stated "customers agree that he or she have purchased the material selected by him or her for educational, scientific, governmental or other similar justification." The statement of facts further stipulated that the police officers saw the signs. Thereafter, arguments were made on the motion to dismiss as follows:

(a) that the petitioners were exempt from prosecution under Article 27, Section 418, by virtue of Section 423;

(b) that the statute was being unconstitutionally applied to petitioners;

(c) that the statute was void for vagueness and for overbreadth;

(d) that the statute on its face and in its application denied to petitioners equal protection of the law and due process of law;

(e) that the statute on its face contained an arbitrary and capricious classification.

Subsequently, timely motions for judgment of acquittal were made on the basis that the petitioners were exempted from prosecution under Article 27, Section 418, in light of Section 423. The trial court held the motions to dismiss, motions to suppress and motions for judgment of acquittal *sub curia*. Thereafter, memorandums were submitted in connection with the motions for judgment of acquittal. On November 3, 1981, the trial court in an oral opinion from the bench based on a recommendation from the state, fined each petitioner $500. The trial court at no time commented on or specifically ruled on the motion to suppress, motion to dismiss and motion for judgment of acquittal or made an independent determination of obscenity, applying contemporary community standards and the *Miller* test, which set the guidelines for the trier of fact.

A timely appeal was taken to the Court of Special Appeals of Maryland on November 14, 1980, which, in a reported opinion dated June 8, 1981, reversed the decision of the trial court and ordered the cases removed for retrial due to procedural error in failing to make a specific ruling on the obscenity of the material.

The petitioners filed a timely petition for writ of certiorari to the Court of Appeals of Maryland seeking review of that portion

of the Court of Special Appeals opinion giving guidance to the trial court concerning the constitutional defenses made by the petitioners.

The Court of Appeals of Maryland denied a petition for writ of certiorari from the petitioners, the order of denial being dated September 9, 1981.

The petitioners therefore seek review from this Honorable Court by filing a timely petition for a writ of certiorari on November 8, 1981.

HOW THE FEDERAL QUESTIONS WERE RAISED

The question of the constitutionality of Article 27, Section 423, and the unconstitutional application of that section to the petitioners under facts and circumstances known at the time of arrest, were raised by motions to dismiss and oral argument, which was heard before the Honorable Albert Figinski in the Criminal Court. These motions are printed in the appendix (34a). The motions to dismiss were denied by Judge Figinski, sitting without a jury, in the Criminal Court of Baltimore City.

The petitioners took an appeal to the Court of Special Appeals of Maryland and thereafter re-raised the issues of the constitutionality of the statute and the unconstitutional application of the statute to them. These questions were once again raised in the Court of Appeals of Maryland by way of a petition for writ of certiorari and the questions presented are printed in the appendix (33a). The rejection of petitioners' petition for writ of certiorari is shown by the order of the Court of Appeals of Maryland and is printed in the appendix (30a).

REASONS FOR GRANTING THE WRIT

Review by this Court would be desirable and in the public interest as it is necessary for this Court to resolve the conflict created by the decision of the lower court and resolution of the serious constitutional issues raised in light of Article 27, Section 423.

I.

Section 423 of Article 27 is void for vagueness for failure to provide the procedure or method which a person must follow in an effort to bring themselves within the confines of its exemption provisions, thereby denying equal protection and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

The statute Article 27, Section 423 does not set forth the procedure or any guidance that persons having educational or other similar justification must follow to allow others to know what their state of mind is as to possession or what procedure one must follow in order to bring themselves within the confines of Article 27, Section 423.

> "[3] It is well settled that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322; *Trio Distributors Corporation et al. v. City of Albany, et al.*, 2 N.Y. 2d 690, 163 N.Y.S. 2d 585, 143 N.E. 2d 329. Even where we might guess at what the draftsman intended and even where there

> is material available to show what was intended, that is not sufficient. 'For validity the statute must be informative on its face.' *People v. Firth*, 3 N.Y. 2d 472, 168 N.Y.S. 2d 949, 951, 146 N.E. 2d 682, 684.
>
> [4] Whether the vagueness is in one statutory section proscribing certain conduct (here Section 418) or in a different section stating exceptions to that proscription (here Section 423) is a matter of form and should not deter the court from recognizing the substantive constitutional deficiency, if such exists, in the statute seen as a whole. See *People v. Abrahams*, 40 N.Y. 2d 277, 386 N.Y.S. 2d 661, 353 N.E. 2d 574."

The difficulty with Section 423, is its failure to clarify or set forth just what one has to do to qualify or come within its exemptions.

On examination, Section 423, can be seen to set forth these favored uses in three degrees of definiteness, or, conversely, of vagueness. Firstly, is "governmental" which is adequately clear, since we can fairly interpret this to mean *de jure* government. In the second category are "scientific" and "educational". True, it may be that certain specific uses might be clearly recognizable as within the ambit of "scientific" or "educational". For example, acquisition by a professor at a university accredited by the State Board of Regents, for use in a regularly offered course, would surely be considered "educational". However, the deficiency in each of these two words is from our not being able to discern what the limits are on their descriptions of use. Each of these words, alone or with the other, is so broad in meaning as to permit honest interpretations over a wide, unpredictable range.

If Section 423 stopped at "scientific, educational or governmental" it would likely be unconstitutionally vague, but the coup de grace is from its proceeding to include a third category: "other similar" uses. What the statute would thereby reveal to us is that there are some one or more uses similarly favored but which are not scientific or educational or governmental. Similar to one although not similar to others, or similar to all three? Does the "justification" derive from the similarity? Or (more likely) does the similarity derive from their sharing the quality of justification? If so, is not reference to some extrastatutory source made essential to find the definition of "justification"?

One might be inclined to construe Section 423 as telling us that the favored uses are those which are "scientific, educational, governmental, or similarly not for simple enjoyment." Besides being excessively creative (the courts are to interpret, if possible, and not to legislate) it is precisely simple personal enjoyment, possession for which is constitutionally protected. *Stanley v. Georgia,* 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969), and to characterize such possession as the one possession that is not justified would be constitutionally repugnant.

II.

The Court of Special Appeals erroneously found that the mere posting, around a store located in an "adult entertainment" area and loaded primarily with pornographic material, of signs indicating that everything in the store is sold only for scientific, educational or governmental purposes hardly suffices to make Section 423 applicable as a matter of law.

Article 27, Section 423 provides in pertinent part, as follows:

> "The prohibitions and penalties imposed in this subtitle shall not extend to persons having bona fide scientific, educational, governmental or other similar justification for possessing such matter, or to distributions thereof pursuant to such justification."

The legislative purpose is clear in that it allows the possession and distribution of *obscene material* under certain circumstances. That is, that persons who have educational, governmental or other similar justifications may possess obscene material and may distribute pursuant to such justification. Educational, certainly by the language on the face of the statute, is not confined to institutions, schools, colleges and universities. *The statute does not set forth the procedure that persons having educational or other similar justification must follow to allow others to know what their state of mind is as to possession.* Therefore, it is respectfully submitted that the facts and circumstances of this particular case must be considered by this Court in connection with Article 27, Section 423.

Petitioners in the matter before this Court operate adult stores that deal with material presumptively protected under the First Amendment, *see Roaden v. Kentucky*, 413 U.S. 496 (1973), and

throughout the stores there appears signs that are visible, stating that the material sold is "sold only for scientific, governmental, educational or other similar justification." At the cash register there appears a sign quite visible that states "the customer agrees that the material selected by him or her is being purchased for scientific, educational, governmental or other similar justification."

Under strikingly similar facts, the court in *People v. Wrench*, 371 N.Y.S. 2d 833 (1975) found defendant who was charged with selling an allegedly obscene publication not guilty and exempted him from prosecution under Section 235.15(1) of the Penal Law of the State of New York which is similar to Maryland Section 423 with the addition of an affirmative defense clause. Section 235.15(1) states:

> "It is an affirmative defense that the persons to whom allegedly obscene material was disseminated . . . consisted of persons or institutions having scientific, educational, governmental or similar justification for possessing or viewing same."

As in *People of New York v. Wrench*, 371 N.Y.S. 2d 833, petitioners clearly demonstrated their intent to bring themselves within the letter of Article 423 by prominently displaying signs which state:

> "The material sold in this store is sold only for scientific, educational, governmental or other similar justification."

By posting signs in prominent places such as squarely in front of the cash register, petitioners set forth the terms of sale which purchasers agreed to through completing the purchase. Petitioners urge they have made all reasonable efforts to come within the

protection of Section 423 and to ascertain whether the prospective purchaser indeed has the requisite justification pursuant to Section 423. To impose a higher hurdle such as restricting sales to card-carrying professors, certified scientists or licensed psychologists would necessarily run afoul of the equal protection clause of the Fourteenth Amendment to the United States Constitution, nor is such scrutiny required by the face of the statute. A close reading of Section 423 reveals the exemption shall apply to persons having the state justification with no regard as to ultimate use or purpose for which the material is purchased.

To force petitioners to ascertain ultimate use of the material purchased would impose an impossible burden, for as stated in *Wrench, supra:*

> "The Court cannot probe the minds of the purchasers of allegedly obscene materials to determine if such person has the requisite justification for possessing such material, in the dark recesses of such person's mind, there lingers anticipation of future excitement upon the viewing of the material which he has purchased.
>
> What is one man's amusement teaches another's doctrine." *Winters v. New York,* 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

In *Wrench, supra,* the court concluded that defendant, through the use of signs and precautions taken to prevent the foistering of material upon an unwary or unwilling public had brought himself within the exemption of Section 235.15(1) in a factual setting identical to that in the instant case. Petitioners have, by fair ponderance of the evidence, established intent to act within the letter of the law. The petitioners submit without more

explanation on the face of the statute, they have done all they were required to do to bring themselves within the framework of Section 423, that is to communicate their intent to sell for the reasons allowed under Section 423. The statute does not require that they must be a university, college, etc. to possess and distribute this material for educational purposes. All the statute facially requires is that it be possessed for one of the specific purposes and, therefore, distribution pursuant to such justification to people who have such justification is permitted.

In this case before this Court, the purpose of possession and distribution were made clear by the seller to the buyer, *i.e.*, the police officer, and he agreed by his silence to a purchase for one of the reasons stated on the sign. One obvious reason is that he is an arm of the government and the purpose was for bona fide governmental purposes. Therefore by the very language of the statute, the conduct of the petitioners was not criminal.

The net result is that the statute Article 27, Section 418 in combination with Section 423, simply does not adequately advise a person what one has to do to come within its exemptions. It is void for vagueness, thereby denying equal protection of the law and due process of the law for one could engage in conduct based on an honest interpretation of its exemption and be prosecuted for criminal conduct.

III.

Article 27, Section 423 creates an arbitrary and capricious classification, thereby denying equal protection of the law and due process of law.

The petitioners in this case urge that in order to preserve the constitutionality of Article 27, Sections 418 and 423, it must be interpreted as authorizing sales to all adults. Petitioners contend that to do otherwise would make the statute unconstitutional as having created an arbitrary and capricious classification for authorized sales, *i.e.*, sales only to those of superior intellect or scholarship, or those in a governmental capacity.

Where the constitutionality of a statute is called in question, the statute must be interpreted if possible in a manner which will preserve its constitutionality. The statute involved here cannot be interpreted to mean that only formal educators, students or scientists or those in governmental capacity, are persons with the necessary justification to possess or view such material.

> "A classification must be reasonable, not arbitrary and must rest upon some ground of difference having fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Eisenstadt v. Baird*, 405 U.S. 438 at 447, 92 S. Ct. 1029 at 1035, 31 L. Ed. 2d 349 at 359.

Can there by any rational or constitutionally valid distinction between certified scientists, teachers, students or government officers on the one hand and the individual who seeks to conduct his own education?

> "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia,* 394 U.S. 557 at 565, 89 S. Ct. 1243 at 1248, 22 L. Ed. 2d 542 at 549.

A state may determine its statutory scheme for the regulation of obscene materials provided it does so in a constitutional manner. *United States v. Reidel,* 402 U.S. 351, 91 S. Ct. 1410, 28 L. Ed. 2d 813. The fact that it has done so by providing an outright exception to the statute is within the State's right. Once having done so, it would be a denial of equal protection of the law (United States Constitution, Fifth and Fourteenth Amendments) to establish arbitrary classifications of persons who are entitled to possess or view allegedly obscene material.

If this Court is to construe Article 27, Sections 418 and 423 as being constitutional, it must reject the state's contentions that the statutory language creates special classes of customers distinguished from the rest of our citizenry by high I.Q. or PH.D's or governmental capacity. Authorizing sales only to card- carrying college professors or certified scientists is as unconstitutional as restricting sales by race, religion or sex.

To say otherwise would be to sanction an elite class reminiscent of the final commandment or Orwell's Animal Farm that "all animals are equal, but some animals are more equal than others."

In order to sustain the constitutionality of the statute, the Court should find the statute as authorizing sales to all adults and not a limited few. *See Wheeler v. State,* 281 Md. 593.

The petitioners note that the language itself admits to this interpretation since it provides for sale for "similar justification" in addition to the more limiting classification.

Furthermore, the severability clause *does not* save Sections 418 and 423, for as stated in *Wheeler, supra:*

> "A long established principle of statutory construction in determining severability questions, is that where the Legislature enacts a prohibition with an excepted class, and a court finds that the classification is constitutionally infirm, the court will ordinarily not presume that the Legislature would have enacted the prohibition without the exception, thereby extending the prohibition to a class of persons whom the Legislature clearly intended should not be reached."

IV.

Article 27, Section 418 is inoperable and unenforceable because on its face it recognizes, by virtue of Section 423, that obscene material has scientific, educational, governmental or other similar justification. Some of the elements that the Supreme Court in *Miller v. California* mandated material cannot possess in order to come within the ambit of the First Amendment.

The Supreme Court of the United States in the *Miller v. California,* 413 U.S. 15, case, mandated that if material lacked literary, artistic, political or scientific value, it did not come within the ambit of the First Amendment. Yet Article 27, Section 418, by virtue of Section 423, provides that the prohibitions and penalties imposed in that subtitle shall not extend to persons having bona fide *scientific,* educational, governmental or other *similar justification* for possessing such matter, or distributions thereof, pursuant to such justification. The implication being that when possessed or used by people having such justification, obscene material has scientific, educational, governmental or *other similar* value.

How then, if the statute on its face recognizes that obscene material may have scientific, educational, governmental or other similar value for use by people in the aforementioned categories, can all others be prosecuted for any use of obscene material? The answer is obvious, the statute itself provides on its face by virtue of Section 423, evidence of which the prosecutors and police officers must take notice, and which the Court must take judicial notice, thereby rendering the statute unenforceable, or unconstitutional, being void for vagueness.

CONCLUSION

For the reasons herein stated, the petitioners respectfully request that this Court issue writ of certiorari to review the decision of the Court of Special Appeals to determine the important constitutional issues created as a result of the decision. It is respectfully suggested that the decision of the court below is in conflict with constitutional guarantees of the United States Constitution.

Respectfully submitted,

BURTON W. SANDLER
Attorney for Petitioners

APPENDIX

OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1500

September Term, 1980

400 E. BALTIMORE STREET, INC.
BLOCK NEWS, INC.
PHILLIP DAVID LONG
THOMAS F. CRAIG
JOSEPH D. STEPHENS
DAVID THOMAS STOUGHTON
CHARLES BOOKS, INC.
DEBORAH ROYOLA REDDING
a/k/a DEBORAH ROYOLA PIERCE

v.

STATE OF MARYLAND

Gilbert, C.J.
Thompson
Wilner,
JJ.

Opinion by Wilner, J.

Filed: June 8, 1981

Opinion

Md. Ann. Code art. 27, § 418 provides, in relevant part, that every person who knowingly "exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." Section 423 of that article, however, states that the "prohibitions and penalties imposed in this subtitle [which includes § 418] shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for possessing such matter, or to distributions thereof pursuant to such justification."

After a non-jury trial in the Criminal Court of Baltimore, appellants were convicted of having violated § 418, for which they were each fined $500. In an effort to overturn those convictions, they contend, first, that the court failed to make the necessary finding that the materials in question were obscene, and second, that § 418, when read in conjunction with § 423 and in the light of controlling constitutional limitations, is invalid, both as written and as applied to their activity. There is merit in their first contention but none in their second.

The cases against appellants, which were consolidated for trial, proceeded upon an agreed statement of facts, supported by certain agreed exhibits. The evidence, so produced, established the following:

(1) On February 28, 1979, police officer Danny Brown walked into a bookstore at 420 E. Baltimore Street owned by appellant Block News, and, for $6.00 each, purchased from appellant Long, the clerk managing the store, two magazines entitled "Pretty Girl Film Review," issues No. 3 and No. 4.

(2) On May 9, 1979, police officer Melvin Kelbaugh also frequented that store and, for $7.50, purchased from appellant Craig, the clerk then in charge, a magazine entitled "Swedish Erotica," issue No. 22.

3) On May 15, 1979, police officer Eric Husok entered a bookstore located at 1827 N. Charles Street owned by appellant Charles Book, Inc., and, for $9.95, purchased from appellant Stephens, the clerk in charge, three magazines — "Wet," "Hot Baby," and "Route Sixty Sex."

(4) On June 4, 1979, police officer Bruce Patton went to a bookstore at 400 E. Baltimore Street owned by appellant 400 E. Baltimore Street, Inc., where, for $6.00, he purchased from appellant Stoughton, the clerk in charge, a magazine entitled "Swedish Erotica," issue No. 23.

(5) On November 16, 1979, officer Husok visited the store at 420 E. Baltimore Street (appellant Block News) where, for $6.00, he purchased from appellant Redding (a/k/a Pierce), the managing clerk, a magazine called "American Erotica."

(6) In each instance, the officer promptly took the magazine(s) to a judge of the District Court who found them to be obscene. Based upon those determinations, the instant charges were filed.

(7) In each instance, the police officer, dressed in mufti, entered the store, wandered about, selected the magazine(s) he wanted, took them to the clerk, and purchased them for the posted price. The magazines on display, including those purchased, were wrapped in cellophane, permitting the browsing customer to see the covers but not the inside pages.

Opinion

(8) There were, throughout the stores, signs stating the "[t]he material sold in this store is sold only for scientific, educational, governmental or other similar justification and the customers agree that they are purchasing these materials only for scientific, educational, governmental or other similar justification," or words of similar import. No one asked the officers whether, in fact they were purchasing the magazines for any of those purposes; nor did they volunteer their purpose in making the purchase. The individual appellants, if called to testify, would have stated that, had the officers told them that they (the officers) were not buying the magazines for the reasons set forth on the signs, the appellants would not have accepted their money.

(9) The three stores hold themselves out as "adult" book stores and are located in areas devoted or catering to "adult entertainment."[1] The magazines purchased by the officers were fairly representative of the merchandise on display and offered for sale at the three stores.

(10) The policemen used public funds to pay for the magazines. There was "allocated in the vice unit a certain amount of money to make purchases in the area of obscenity and gambling and prostitution money. This general fund was used to make this evidentiary purchase."

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1. The two stores located in the 400 block of East Baltimore Street are in a special adult entertainment zoning district. *See* Baltimore City Municipal Central Area Renewal Plan, approved March 8, 1977. The third store, on North Charles Street, is not in such a district; however, the evidence showed that the block in which it was located contained "a number of places of adult entertainment" — *i.e.*, "bars, night clubs, with dancing go-go girls, advertisements on the outside, there are a number of book stores, that advertise themselves to be adult book stores."

The convictions rested upon these facts, upon the magazines purchased by the officers, and upon photographs of the signs posted in the stores (see ¶ 8 above), the magazines and photographs being admitted into evidence without objection.

In this appeal, appellants complain:

> "I. The appellants were denied due process of law and equal protection of the laws in violation of their constitutional rights under the First, Fifth and Fourteenth Amendments, when the Trial Court found the appellants guilty on the basis that the cases were tried on the theory that the obscenity of the materials was assumed.
>
> II. The Trial Court erred in finding that the appellants did not come within the exemption of Article 27, Section 423, thereby denying to appellants due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution.
>
> III. Article 27, Section 418 denied to appellants equal protection of the law because it creates an arbitrary and capricious classification.
>
> IV. Article 27, Section 418, is inoperable and unenforceable because on its face it recognizes that obscene material has scientific, educational, government or other similar justification some of the elements, that the Supreme Court in Miller v. California mandated material cannot possess in

order to come within the ambit of the First Amendment."

(1) Assumption of Obscenity

Three proceedings were held in the trial court. The first, on March 25, 1980, was nominally for the purpose of considering appellants' several motions to suppress the magazines and to dismiss the charges. Those motions, virtually identical in each case, rested on essentially the same grounds — that the underlying statutes were unconstitutional for a variety of reasons, that the charges were vague and insufficient, and that the magazines (and their distribution) were constitutionally protected. It was agreed at that proceeding that, if those motions were denied, the case would proceed before the court, sitting without a jury, on an agreed statement of facts, and that the court would take the entire matter *sub curia*. Pursuant to that agreement (and without objection), the court made the necessary inquiries under Maryland Rule 735d, accepted from appellants their waiver of a jury trial, and had placed in the record the agreed statement and exhibits recounted above.

The second proceeding, which occurred on June 16, 1980, was taken up with discussion of the various legal issues raised by appellants. The primary thrust of appellants' argument was that, even if obscene, by virtue of the signs scattered around the stores the magazines and their distribution were exempt from criminality under § 423. In that limited context, appellants expressed no objection to the court asuming that the magazines were, in fact, obscene, their point being that, because § 423 permitted obscene material to be exhibited and sold for certain purposes, it made no difference whether they were obscene. They made clear, however, that they were not conceding obscenity in the event the

court rejected their exemption argument. Again, the court held the matter *sub curia*.

Judgment day was November 3, 1980.[2] The court, after noting that the "key issue" was an interpretation of § 423, observed that the cases "were tried on the theory that the obscenity of materials was assumed and that the defendants . . . could not be found guilty of these charges because of the application of the exemption." That, as we have noted, had been the primary issue argued by appellants, both orally and in the extensive memoranda supplied to the court, although at the June 16, hearing, defense counsel made clear to the court that "[i]f you decide against us on a motion for judgment of acquittal then you as a finder of fact must make a determination by determining on a contemporary community standard . . . what would be in the minds of the jury." It is evident from the record, however, that the court omitted to make that ultimate finding. Although it characterized the magazine covers as "sexually explicit" and concluded that such cover scenes were sufficient to alert appellants "that the material inside *may be* obscene" (emphasis supplied), the court never discussed the criteria necessary for a finding of obscenity and never actually made a finding that the magazines were, in fact, obscene. After finding that the exhibition and distributions were not protected by § 423, the court simply entered sentence, and thus forgot that § 423 has no application and is entirely irrelevant unless the material is first bound to be obscene under § 418.

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2. There can be little doubt from the transcripts of the three proceedings that the verdicts were rendered at the November 3 proceeding. The docket entries, however, show the verdicts of guilty as having been entered on March 24, 1980. To that extent, the docket entries are clearly in error and ought to be corrected.

It is not necessary, of course, for a trier of fact to *announce* its verdict in the context of specific issues. But, whether trial is before a court or a jury, in order for a conviction to be sustained, the record must show in some way that, in rendering its verdict, the trier considered and at least implicitly made findings upon all of the factual issues necessary to support a verdict of guilt. In a jury trial, that requirement is normally satisfied through the court's instructions, assuming that they are proper ones. In a non-jury trial, the record often tends to be less specific. Courts do not always articulate their findings on each and every element. Such silence is not necessarily fatal, however, if the requisite findings are fairly implicit in the court's verdict and the record does not affirmatively indicate an actual omission to make such findings. The problem here is not mere silence from which a finding of obscenity might be inferred, but an affirmative (and erroneous) statement by the court clearly indicating that obscenity was *assumed*. A court may not assume a critical element of guilt.

This is not a case of insufficient evidence. With the agreed statement of facts and the exhibits, the court had before it enough evidence to support a finding that the magazines were obscene under § 418. The problem is it never made that finding; and, although, through our Constitutionally mandated review of the material we might conclude that it was obscene, such a finding could not serve as a substitute for the required finding by the trial court. We therefore must reverse the convictions. Because the error was one of trial procedure — the failure to make a necessary finding — and not of insufficient evidence to support such a finding, we shall remand the cases for new trials. *Burks v. United States*, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978); *State v. Boone*, 284 Md. 1 (1978).

(2) The Other Issues

Appellants have made clear, both in the trial court and here, that their principal defense to these prosecutions is that of Constitutional and statutory interpretation — the three other issues noted earlier. Those questions will therefore undoubtedly arise in the retrials, and for the guidance of the trial court, we shall address them. Maryland Rule 1085.

Appellants argue that (1) their activities fell within the § 423 exemption; (2) if they did not, § 418, read in the light of § 423, creates an arbitrary classification by authorizing sales only to "formal educators, students or scientists or those in a governmental capacity"; and (3) the two sections, read together, contravene the definition of obscenity mandated by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), by recognizing that "obscene" material has scientific, educational, or governmental value.

In order to consider and resolve these challenges, it is necessary for us to trace the historical development of our obscenity law.

The publication and exhibition of lewd and obscene words and writings was initially a concern of the English ecclesiastical courts; but, by the Eighteenth Century, it had become punishable as a common law misdemeanor, either as a libel or as a public nuisance. The underlying rationale for making such activity criminal was that it tended to weaken the bonds of civil society, virtue, and morality.

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3. *See* Clark and Marshall, *Law of Crimes*, §11.10; *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938); Model Penal Code and Commentaries (Official Draft and Revised Comments), Part II (1980), §251.4 (p. 481).

The Maryland General Assembly first took note of the problem of obscenity in 1853 when it observed that the publication of obscene and licentious matter in the form of advertisements in newspapers and other periodicals had become more frequent, found that such matter was "exceedingly injurious to the morals of the community," and decided that "the common law in this regard [should be re-enacted and enforced." It therefore made the publication of "any obscene or licentious matter" in any newspaper or other periodical a statutory misdemeanor, punishable by fine and imprisonment *See* Laws of Md., 1853, ch. 183.

The prohibition enacted in 1853 was extended in 1886 to cover the drawing, manufacture, production, exhibition, or distribution of any "obscene book, pamphlet, paper-writing, advertisement circular, print, picture, drawing or other representation, figure or image on or of paper or other material of an indecent or immoral nature . . . ." Laws of Md., 1886, ch. 490. In 1894, the statute was rewritten, without much substantive change; and, except for some amendments not relevant here, the law remained more or less the same until the 1960's.[4]

The word "obscene" was not defined in the statute and thus neither was the precise ambit of the statutory proscription; but

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4. In 1961, the General Assembly made it a separate crime to distribute obscene material commercially to persons under eighteen years of age (Laws of Md., 1961, ch. 473; *compare* current Md. Ann. Code art. 27, §419), and also authorized the circuit courts, upon petition of the State's Attorney, to enjoin the distribution of obscene material under certain circumstances (Laws of Md., 1961, ch. 382; current Md. Ann. Code art. 27, §418A). Neither of these enactments affected the prohibition as rewritten in 1894 (now §418). In response to *Smith v. California*, 361 U.S. 147 (1959), the General Assembly added the element of *Scienter* to §418 in 1960, requiring that the prohibited actions be "knowingly" done. Laws of Md., 1960 ch. 39.

that did not appear to have been a significant problem until the Supreme Court decided *Roth v. United States* and *Alberts v. California*, 354 U.S. 476 (1957), and made it one.[5]

In *Roth* and *Alberts* the Court sustained convictions under the Federal and California obscenity laws, neither of which defined the critical term. In the context of this case, *Roth* did two important things: (1) it stated affirmatively and explicitly that which the Court had in the past merely assumed — "that obscenity is not protected by the freedoms of speech and press" (354 U.S. at 481-85);[6] and (2) it purported to give a Constitutional definition to the word "obscene." The definition, or standard, chosen to determine whether a publication was obscene and thus subject to proscription was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken

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5. In the 104 years from the enactment of the 1853 statute to the decision in *Roth*, only two cases involving the obscenity law reached the Court of Appeals; and both of them concerned the form of indictment rather than the scope or meaning of the prohibition itself. *See Nicholson v. State*, 36 Md. x (Unreported, 1872); *State v. Monfred*, 183 Md. 303 (1944).

6. The Court iterated and reiterated that precept at least three times. At p. 484, it stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained. . . ." At p. 485, the Court repeated with emphasis an earlier passage from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), that lewd and obscene utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Following this, also at p. 485, the Court flatly held that "obscenity is not within the area of constitutionally protected speech or press.

as a whole appeals to prurient interest." 354 U.S. at 489.[7] If the statutory proscription rested upon that standard, said the Court, it did not offend Constitutional safeguards.

In *Monfred v. State*, 226 Md. 312 (1961), *cert. den.* 368 U.S. 953 (1962), the Court of Appeals adopted and engrafted into the Maryland obscenity statute the *Roth* test — at least, it said (p. 323), "until the Supreme Court specifically speaks further in this uncertain area." *See also Yudkin v. State*, 229 Md. 223 (1962), and *Levin v. State*, 1 Md.App. 139 (1967), *cert. den.* 247 Md. 740, *cert. den.* 389 U.S. 1048. The area truly was uncertain. The Supreme Court had a tiger by the tail and as noted in a comprehensive article in 52 N.Y.U.L.Rev. 810, 820, in the first twenty years since *Roth*, there followed from that Court "no fewer than one hundred signed opinions. . . in twenty-seven cases" dealing with obscenity. The subject of obscenity, remarked Justice Harlan in his dissent in *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704-05 (1968), "has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Indeed, he referred to it as the "intractable obscenity problem." *Id.*[8]

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7. Rejected by the Court was the test laid down in *Regina v. Hicklin* (1868) L.R. 3 Q.B. 360, which determined whether material was obscene by the effect of isolated passages upon particularly susceptible persons. 354 U.S. at 488-89. Under the *Roth* test, the *entire* work had to be considered in terms of "the average person."

8. No less perplexed was Justice Stewart who began to see the task as "trying to define what may be undefinable." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Concurring Opinion). Stewart finally concluded that the proscription had to be limited to "hardcore pornography," as to which he said in an oft-quoted statement: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . ." *Id.*

Part of what made the problem intractable was the "plurality" Opinion by Justice Brennan (joined only by Chief Justice Warren and Justice Fortas) in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966) ("*Memoirs*"), a case involving the burning question of whether the novel *Fanny Hill*, first published in 1749, could legally be banned in Boston in 1965. It was there noted that under the *Roth* definition

> "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is *utterly* without redeeming social value." (Emphasis supplied.) *Id.* at 418.

See also Ginzburg v. United States, 383 U.S. 463 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966).

Whether prompted by the decision in *Memoirs*, or the general maelstrom into which the obscenity issue then found itself, or some other reason no longer apparent, the General Assembly decided in 1967 "generally to revise the laws of the State pertaining to obscene matter," and thus enacted Laws of 1967, ch. 394, which, with changes not relevant here, is our current statute.

That statute — in particular §§ 418 and 423 — has to be viewed, at least initially, in the light of the then-current law. Although new § 418 substantially rephrased the former section, it did not change the basic proscription against exhibiting and distributing obscene material. Because the legislature again declined

to provide a statutory definition of obscenity, however, it left to the courts the task of supplying such a definition and thus circumscribing the scope of the basic prohibition. The statutory proscription, in other words, was so broad as the Supreme Court would allow.[9]

At the time the statute was enacted, the controlling standards were assumed to be those explicated in the Brennan plurality Opinion in *Memoirs*, which standards had previously been applied to the former § 418 in *Donnenberg v. State*, 1 Md.App. 391 (1967). Those standards, as noted, were definitional ones; they served to define the term and thus provide a constitutional perimeter within which § 418 could operate. They did not, however, purport to carve out any constitutional exceptions or exemptions. If the material met the modified *Roth* definition of obscenity, it could be regulated, no matter who was selling or buying it or for what purpose the material was exhibited, distributed, or used.

That presented somewhat of a problem, however, one that both State and Federal courts had wrestled with for many years. Chief Justice Warren alluded to it in his concurring Opinion in *Roth*, when, at p. 495 of 354 U.S., he noted:

> "The line dividing the salacious or pornographic from literature or science is not

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9. As introduced, the bill did contain a definition of "obscene" — that stated in *Roth* — but it had already become obsolete by virtue of *Memoirs* and was deleted by amendment during the legislative process. In *Lancaster v. State*, 7 Md. App. 602, 604 (1969), we reaffirmed (with respect to the new statute) that "[t]he term 'obscene,' as used in Section 418, was intended by the Legislature to have the same meaning as that constitutionally ascribed to the term by decisions of the Supreme Court of the United States."

straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. *The conduct of the defendant is the central issue, not the obscenity of a book or picture.* The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." (Emphasis supplied.)

Could material be obscene when viewed by the average person, because, to him, applying contemporary community standards, its dominant theme appealed to prurient interest, and yet, in the hands of a scientist studying obscenity, not be obscene because to him it did not appeal to the prurient interest? Or, restated, if such material, meeting all the other criteria for obscenity, could be the proper subject of scholarly investigation and study, could it then be said to be "utterly without redeeming social value" and thus legally obscene?

The dilemma normally arose in the context of attempts by the government (State or Federal) to seize or prevent the importation or mailing of materials it considered to be obscene, *i.e.*, prior censorship as opposed to criminal prosecution. Most of the courts, applying pre-*Memoirs* criteria, recognized the need to distinguish between the pandering of lewd material to the public at large and the reception and use of such material for legitimate

research and education purposes; and they usually did so by concluding that, in the hands of researchers, medical personnel, or art collectors, such material was simply not obscene. *See, for example, United States v. 31 Photographs, Etc.*, 156 F. Supp. 350 (S.D.N.Y. 1957), involving materials ordered by the Institute for Sex Research, Inc. (the "Kinsey" Institute) of Indiana University, and cases cited and reviewed therein; *also People v. Marler*, 199 Cal.App.2d 889 (Cal.App. 1962); *but compare United States v. One Unbound Volume, Etc.*, 128 F.Supp. 280 (D. Md. 1955).

That type of reasoning may have been prompted by the fact that the statutes in question purported to apply their sanctions to all obscene material and admitted of no exception therefrom for obscene material used for a "legitimate" purpose. That left the courts no way of making the desired distinction other than in a definitional context. The effect of that, however, was to create a concept of "variable obscenity" — one that judged the obscenity of a publication, at least in part, on the basis of how it was purveyed, to whom it was purveyed, and the purpose for which it was purveyed.[10] This concept was given expression in several different contexts by Justice Brennan in *Memoirs* and the companion cases of *Ginzburg* and *Mishkin*.[11]

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10. *See* Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960).

11. In *Memoirs*, 383 U.S. at 420, Brennan noted that if a book had the requisite prurient appeal and was patently offensive, but had only a minimum of social value, "the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected." Given the actual holding of the Court — that the book was not obscene — that statement was probably mere *dicta*. In *Ginzburg*, however, Brennan's statement at 383 U.S. 463 that "the question of obscenity

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In seeming to adopt these various forms of variable obscenity, especially in and after *Memoirs*, the Supreme Court never satisfactorily addressed the question of whether material could ever be "utterly without redeeming social value" if it had some value in a clinical setting or for purposes of research. One can only assume that the "social value" criterion enunciated by Justice Brennan related to the intrinsic worth of the ideas being communicated in the publication, and not to any indirect value the publication might itself have as an object of study or as a therapeutic device in a clinical program. Otherwise, the variable obscenity concept, seemingly adopted in that trilogy of cases, would be flatly inconsistent with the "social value" standard so clearly expressed in the very same opinions.

Variable obscenity, when so viewed, was one pragmatic answer to a real problem; but it created some vexing problems of its own. Even if one accepts the initial proposition that the same publication can, at the same time, be obscene or not obscene depending upon who is looking at it, there is still the difficulty of regarding that which is otherwise obscene as not obscene when viewed, for example, (1) by a researcher (or those participating in research experiments) whose purpose in viewing it is to study (or assist in

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(Cont'd)

may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity. . ." was more significant, for the "setting" — the manner in which the materials were advertised — was the critical factor used to sustain Ginzburg's conviction. In *Mishkin*, which involved magazines depicting masochistic and bizarre sexual behavior designed for what the Court called "a clearly defined deviant sexual group" (p. 508), the Court said, at p. 509 (of 383 U.S.), "We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group. . . ."

the study of) *obscenity* and its effects[12] or (2) by patients in a medically supervised clinic whose purpose in viewing it is to correct sexual dysfunction — *i.e.*, to heighten their sexual appetites and awareness, to appeal to the prurient interest.[13]

Even before *Roth*, this dilemma was the subject of some debate in legal circles, and eventually a way was found around it. The problem, in part, was one of overlapping concepts, of confusing a publication having some intrinsic literary, scientific, or artistic value sufficient to offset its prurient appeal with one not having such offsetting intrinsic value but which might be the subject of legitimate study or clinical use, and thus become clothed with an extrinsic value for that limited purpose.

The solution, devised or adopted by the draftsmen of the Model Penal Code, was to regard the first type of publication as simply not being obscene in the first instance, which is how the courts tended to regard it,[14] and to consider the second type as possibly falling within the proper definition of obscenity but

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12. *See* Technical Reports of the Commission on Obscenity and Pornography, Government Printing Office (1971); Money and Athanasiou, *Pornography: Review and Bibliographic Annotations*, Amer. Journ. of Obstetrics and Gynecology, Vol. 115, No. 1, pp. 130-46 (1973).

13. *See, for example*, Hartman and Fithian, *Treatment of Sexual Dysfunction* (1974), ch. 10; Bjorksten, *Sexually Graphic Material in the Treatment of Sexual Disorders*, in Meyer, *Clinical Management of Sexual Disorders*, pp. 161-94 (1976); Lobitz and LoPiccolo, *New Methods in the Behavioral Statement of Sexual Dysfunction*, in Fischer and Gochros, *Handbook of Behavior Therapy with Sexual Problems*, Vol. 1, pp. 7-14 —1977).

14. *See* Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 Minn. L. Rev. 295 (1954).

nevertheless deserving of protection when used for legitimate research or clinical purposes. This was done by (1) adopting as a definitional condition of obscenity that the *predominant* appeal be to the prurient interest, thus recognizing "that a work of art or literature may contain elements of prurient interest that are subordinate to the positive values of the work";[15] and (2) providing that "[i]t is an affirmative defense to prosecution. . . that dissemination was restricted to: (a) institutions or persons having scientific, educational, governmental or other similar justification *for possessing obscene material;* or (b) non-commercial dissemination to personal associates of the actor." (Emphasis supplied.) *See* § 251.4(3), Model Penal Code.

The intent behind this approach is made clear in the A.L.I. comments to § 251.4(3). Comment 9 (p. 501) states, in relevant part

> "Psychologists, sociologists, anthropologists, and students of art and literature must not be barred from access to relevant materials merely because they may appeal to prurient interest. *It seemed better to face this problem realistically by way of explicit exemption, rather than to twist the definition of obscenity so as to reach the correct result by describing obviously pornographic materials as not 'obscene' if in the hands of an artist or scientific researcher.*" (Emphasis supplied.)

Section 251.4 of the Model Penal Code was first published as part of Tentative Draft No. 6 in May, 1957. It was finally approved by the American Law Institute in May, 1962, and soon

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15. Model Penal Code and Commentaries, *supra*, note 7, p. 492.

thereafter parts of it began to be adopted, in one form or another, by a number of State legislatures. In particular, one finds the approach taken in § 251.4(3) — of exempting material in the hands of researchers and clinicians from criminality rather than from the definition of obscenity — embodied in many (if not most) of the State obscenity statutes currently in force.[16]

There is no uniformity among the States in the wording of the exemption. Some, for example, couch it as an "affirmative defense,"[17] as does the Model Penal Code, while others (like Maryland) speak in terms of an exemption.[18] Some States frame the exemption in terms of the particular types of institutions permitted to acquire, possess, and use obscene material — libraries,

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16. *See, for example,* Cal. Penal Code §311.8 (Deering); Conn. Gen. Stat. Ann. §53a-195; Del. Code tit. 11, §1362(1); D.C. Code §22-2001(c); Ga. Code §26-9905a(c); Idaho Code §18-4102; Ill. Ann. Stat. ch. 38, §11-20(f) (Smith-Hurd); Kan. Stat. §21-4301(3) (1980 Supp.); Ky. Rev. Stat. Ann. §531.070 (Baldwin); 9A La. Rev. Stat. Ann. §14-106(D) (1981 Supp.); Me. Rev. Stat. tit. 17, §2911.2.A; Mass. Ann. Laws ch. 272, §29; Mich. Comp. Laws §722.676; Minn. Stat. §617.295(a) (1981 Supp.); Neb. Rev. Stat. §28-815(1); N.H. Rev. Stat. Ann. §650:4, N.M. Stat. Ann. §40-50-5; N.Y. Penal Law §235.15 (Consol.); N.C. Gen. Stat. §14-190.10(c)(1) N.D. Cent. Code §12.1-27.1-11; Ohio Rev. Code Ann. §2907.32.1(B) (Anderson); Okla. Stat. tit. 21, §1021.1 (1980 Supp.); Or. Rev. Stat. §167.085(2); Pa. Stat. Ann. tit. 18, §5903(j); S.D. Compile Laws Ann. §22-24-31(4); Tenn. Code Ann. §39-3016 (1980 Supp.); Tex. Penal Code Ann. tit. 9, 43.23 (1980 Supp.) (Vernon); Wash. Rev. Code §9.68.100.

17. *See, for example,* the California, Delaware, D.C., and Illinois Codes, *supra,* n. 16.

18. *See* Pennsylvania Code, *supra,* n. 16. Except possibly in determining who has the burden of proof on the issue (*see Mackall v. State,* 283 Md. 100 (1978)), we see no significant distinction between stating the caveat as an exemption from criminality as opposed to an affirmative defense to a criminal prosecution.

museums, schools, etc. — without specific regard to purpose;[19] most, however, tie the exemption to the purpose of the acquisition and use and not expressly to the nature or status of the accquirer or user. These latter States (like Maryland) speak in terms of scientific, educational, and occasionally governmental purposes.[20] Although the precise wording is different in nearly every case, the general purpose and effect of these provisions is similar; it is to adopt the approach taken in the Model Penal Code, as explained in Comment 9, *supra*.[21]

There can be little doubt, from its very wording, that our § 423, as enacted in 1967, was taken from § 251.4(3) of the Model Penal Code, and was intended to serve the same purpose. No other construction would appear to be warranted or reasonable.

Since the enactment of § 423, there has, of course, been a major shift in the constitutional definition of obscenity. In *Miller v. California*, 413 U.S. 15 (1973), and four companion cases,[22]

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19. *See* Louisiana, Maine, Massachusetts, Minnesota, Nebraska, North Carolina, Pennsylvania, and Washington Codes, *supra*, n. 16.

20. *See* Connecticut, Delaware, D.C., Georgia, Idaho, Illinois, Kansas, Kentucky, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, and Vermont Codes, *supra*, n. 16.

21. Comments in the Illinois Code make this especially clear. The Illinois law, as noted, provides an affirmative defense for dissemination to "institutions or individuals having scientific or other special justification for possession of such material." The Committee Comment to that provision states that it is "simply a recognition that police, social scientists, educational institutions and other authorities may have a legitimate need to possess obscene material."

22. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12 200 Ft. Reels of Super 8MM Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973).

the Supreme Court formally abandoned the three-stage *Memoirs* test, which the Court found had created a burden "virtually impossible to discharge." *Id.* at p. 22. In its place, the Court fashioned a new[23] tripartite test. The critical language appears at pp. 23-24:

> "State statutes designed to regulate obscene materials must be carefully limited. . . . As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,. . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . ." (Citations omitted; footnote omitted.)

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23. Part of the new test, as is evident by a simple comparison, is essentially a rephrasing of *Roth-Memoirs*. The primary thrust seems to be in the substitution of whether the work lacks serious literary, artistic, political, or scientific value for whether it is utterly without redeeming social value.

Having thus stated the test in conceptual terms, the Court gave "a few plain examples of what a state statute could define for regulation"; namely: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "(b) Patently, offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* Thus, said the Court at p. 27, "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, *as written or construed.*" (Emphasis supplied.)

This new test, set forth in *Miller*, was first adopted by this Court in the context of Md. Ann. Code art. 66A (providing for the advance licensing — *i.e*, censorship — of motion pictures) in *Ebert v. Maryland State Board of Censors*, 19 Md.App. 300 (1973). In *Village Books, Inc. v. State*, 22 Md.App. 274 (1974), *cert. den.* 273 Md. 723, we specifically adopted it (as further explicated by the Supreme Court in *Hamling v. United States*, 418 U.S. 87 (1974), and *Jenkins v. Georgia*, 418 U.S. 153 (1974)) as controlling the scope of art. 27, § 418 as well. That, we think, serves to meet the *Miller* requirement that the State statute, as written or construed, specifically define the proscribed conduct. *See Ward v. Illinois*, 431 U.S. 767 (1977); *Star v. Preller*, 375 F.Supp. 1093 (D. Md. 1974) *aff'd* 419 U.S. 956.[24] The "obscene matter" proscribed by

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24. *Compare Obscenity '73: Something Old, A Little Bit New, Quite a Bit Borrowed, But Nothing Blue*, 33 Md. L. Rev. 421, 452-53 (1973), written prior to our *Village Books, Inc.*, in which the author concluded that §418, in light of its then-current judicial interpretation, was "lacking the specificity required by the *Miller* Court."

§ 418 is precisely that which the *Miller-Hamling-Jenkins* Courts said may constitutionally be proscribed — no more and no less.

Although *Miller* clearly controls the scope of § 418 in terms of defining what is obscene, it has no direct impact on § 423. *Miller* does not reintroduce the concept of variable obscenity, as suggested by appellants; it does not necessarily equate the definitional criterion of literary, artistic, political, or scientific value with the usability of material for scientific, educational, or governmental purposes. To conclude otherwise, in view of the usability of even "hard core" pornography for research, teaching,[25] and clinical purposes, would be tantamount to saying that nothing is legally obscene — that there is no such thing as proscribable obscenity. And that, most certainly, has never been the position of the Supreme Court.

In the commpanion case of *Paris Adult Theatre I v. Slaton, supra,* 413 U.S. 49, 69, the Court made clear that its holdings were directed "not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights." It was the "commerce in obscene material," the "exhibition of obscene material in places of public accommodation" that was unprotected by the Constitution and thus subject to regulation. *See also Kaplan v. California, supra,* 413 U.S. 115, 120: *Paris Adult Theatre I* "reaffirms that commercial exposure and sale of obscene materials *to anyone,*

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25. *See, for example,* Vandervoort and McIlvenna, *Sexually Explicit Media in Medical School Curricula,* in Green, *Human Sexuality; A Health Practitioner's Text,* pp. 235-44 (1975); and in general, a bibliography entitled *Professional Use of Erotica (Bibliotherapy)* published by the Institute For Sex Research, Indiana University.

including consenting adults, is subject to state regulation." (Emphasis supplied.)

From these expressions, and indeed from the entire thrust of *Miller*, we think it clear that the exemption from criminality stated in § 423 in no way renders the general proscription of § 418 nugatory. It does not eradicate or annul the concept or definition of obscenity or Maryland's power to regulate that obscenity. Section 423 under *Miller* has the same function as it did before *Miller:* it "permits" *obscene material* to be used for certain specified purposes.

We turn then to the question of whether § 423 carries out that function in a constitutional manner, specifically, whether it creates arbitrary or capricious classifications. Appellants' contention that it has that effect is based upon their construing the exemptions as applying only to "formal" or "certified" educators, students, or scientists, which discriminates against those who seek such material for their own personal education.

In *Wheeler v. State*, 281 Md. 593, 602 (1977), the Court of Appeals observed that, because obscenity is unprotected by the First Amendment, the exemptions from criminality under the State obscenity law involve "neither a suspect class nor a fundamental right." The test to be applied in viewing an "equal protection" claim, therefore, is the "reasonable basis" or "rational relationship" one; *i.e.*, the legislative classification "must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Id.*

As we have noted throughout, it has long been recognized, first by the courts, then by legislative bodies, that obscene material of a type that is constitutionally subject to regulation by the State

ought to and may be permitted for *bona fide* educational and scientific purposes, in a variety of research and clinical settings. Use of the material for those purposes provides a certain social utility to it that it does not otherwise possess; that infusion of external utility, indeed, is all that justifies the use of the material in those circumstances.

We have no difficulty in concluding that the statutory exemption for persons having *bona fide* scientific, educational, governmental, or other similar justification for possessing obscene material does not serve to contravene the "equal protection" clause of the Fourteenth Amendment. Those are reasonable classifications, sufficiently well defined, and bear a rational relationship to a legitimate governmental interest. *See Sanza v. Maryland State Board of Censors*, 245 Md. 319, 341 (1967), sustaining the validity of similar exemption under art. 66A of the Code; *Star v. Preller*, 352 F.Supp. 530 (D. Md. 1972), *remanded* 413 U.S. 905 in light of *Miller v. California and reaffirmed* 375 F.Supp. 1093 (1974), *aff'd* 419 U.S. 956; *also State v. Starr Enterprises, Inc.*, 597 P.2d 1098 (Kan. 1979); *State v. Next Door Cinema Corp.*, 587 P.2d 326 (Kan. 1978); and *People v. Illardo*, 423 N.Y.S.2d 470 (1979); and *cf. Modern Social Education, Inc. v. Preller*, 353 F.Supp. 173 (D. Md. 1973), *aff'd in part, rev'd in part (on other grounds)*, 512 F.2d 1241 (4th Cir. 1975).[26]

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26. In responding to appellants' "equal protection" argument, we have assumed that they have standing to raise it in light of the record in this case. This is an assumption, not a determination. *Compare Matter of Trader*, 272 Md. 364 (1974).

There may, perhaps, come a point where the use of pornographic material in an educat[illegible]nal or therapeutic setting becomes so widespread and unstructured in terms of the general population that the statutory classifications created in §423 could lose their rationality. In that circumstance, a significant "equal protection" problem would arise. The record in this case, however, does not reveal that we have yet reached that point or that we necessarily ever will.

Finally, we turn to the question of whether appellants' activities were covered by the § 423 exemptions. Because this issue is a mixed one of fact and law and will thus require some initial findings by the trial court, we shall do no more than state what we consider to be the controlling legal principles, leaving it to the trial court on remand to determine their particular application.

The primary focus under § 423 is on the actions of *appellants*, not their customers. That among the general traffic patronizing their emporia may be an occasional researcher, educator, or clinician searching for material *he or she* intends to use for a protected purpose does not require a finding that *appellants* are possessing, exhibiting, and disseminating their wares for such a purpose. At best, § 423 might protect those particular disseminations, but not the general possession, exhibition, and offering for sale of the material in the store.

The mere posting around a store located in an "adult entertainment" area, catering to such of the general public as visit that area, and loaded primarily with pornographic material, of signs indicating that everything in the store is sold only for scientific, educational, or governmental purposes hardly suffice to make § 423 applicable as a matter of law. It is no different than the situation of a liquor store defending against a charge of selling to minors by posting signs stating that liquor is not sold to minors, or by signs declaring that all customers are adults, whether in fact they are. One cannot legitimate that which is illegitimate by calling it legitimate.

Appellants place considerable reliance on *People v. Wrench*, 371 N.Y.S.2d 833 (Dist. Ct. 1975), a *nisi prius* decision of the District Court of Suffolk County, New York. *Wrench* involved

an ordinary bookstore located in a shopping center. In the front, it sold everything "from light fiction to cook books" (371 N.Y.S.2d at 835); in "a separate rear section, physically separated from the rest of the bookstore by walls and a door" was displayed "adult material." *Id.* Signs restricted access to the rear portion to persons over twenty-one; also posted were the types of signs placed in appellants' stores. A police officer went to the rear part of the store, which had a separate cash register, and purchased a magazine alleged to be obscene.

On those facts, the Suffolk County District Court concluded that the defendant had established the affirmative defense of disseminating the magazine to a person having a "governmental or similar justification for possessing or viewing same" — the New York counterpart to our § 423.

People v. Wrench is not persuasive authority to us. Aside from some obvious differences in the factual setting, the holding in that case does not represent the definitive law of New York, and we do not accept as valid the reasoning upon which it rested. *See People v. Martin*, 420 N.Y.S. 2d 318 (Supreme Ct. 1979); *People v. Illardo*, 411 N.Y.S.2d 142 (County Ct. 1978), *aff'd* 423 N.Y.S.2d 470 (1979).

The question is one of fact, which will have to be determined by the trial court.

JUDGMENTS REVERSED AND REMANDED FOR RETRIAL; APPELLANTS TO PAY THE COSTS OF RECORD EXTRACT: MAYOR AND CITY COUNCIL OF BALTIMORE TO PAY ALL OTHER COSTS."

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27. Appellants printed and filed a record extract, which is not required in criminal appeals. *See* Maryland Rule 1028. Notwithstanding their ultimate success in this appeal, it would be unjust to charge the City with the cost of that record extract.

ORDER OF THE COURT OF APPEALS OF MARYLAND

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 304

September Term, 1981

(No. 1500, September Term, 1980
Court of Special Appeals)

400 E. BALTIMORE STREET, INC., BLOCK NEWS, INC., PHILLIP DAVID LONG, THOMAS F. CRAIG, JOSEPH D. STEPHENS, DAVID THOMAS STOUGHTON, CHARLES BOOKS,INC., DEBORAH RAYOLA REDDING a/k/a Deborah Rayola Pierce

v.

STATE OF MARYLAND

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert C. Murphy
Chief Judge

Date: September 9th, 1981.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. First Amendment — United States Constitution

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fifth Amendment — United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Section 1, Fourteenth Amendment — United States Constitution

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Article 27, Section 418 of Maryland Code

"Sending or bringing into State for sale or distribution; publishing, etc., within state.

Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

5. Article 27, Section 423 of Maryland Code

"Exemptions

The prohibitions and penalties imposed in this subtitle shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for possessing such matter, or to distribute thereof pursuant to such justification."

"ISSUES PRESENTED" EXCERPTED FROM PETITIONERS' BRIEF BEFORE THE MARYLAND COURT OF SPECIAL APPEALS

ISSUES PRESENTED

1. Were the Appellants denied due process of law and equal protection of the laws in violation of their constitutional rights under the *First, Fifth* and *Fourteenth Amendments,* when the Trial Court found the Appellants guilty on the bases that the cases were tried on the theory that the obscenity of the materials was assumed.

2. Did the Trial Court err in finding that the Appellants did not come within the exemption of Article 27, Section 423, thereby denying to Appellants due process of law and equal protection of the law under the *First, Fifth* and *Fourteenth Amendments to the United States Constitution.*

3. Does Article 27, Section 418 deny to Appellants equal protection of the law because it creates an arbitrary and capricious classification, by virtue of Section 423.

4. Is Article 27, Section 418 inoperable and unenforceable because on its face it recognizes that obscene material has scientific, educational, governmental or other similar justification, some of the elements that the Supreme Court in *Miller v. California* mandated material cannot possess in order to come within the ambit of the *First Amendment.*

MOTION TO DISMISS

IN THE CRIMINAL COURT OF BALTIMORE

CASE NO: 47917859

STATE OF MARYLAND

v.

400 E. BALTIMORE ST., INC.

Defendant

The Defendant, through undersigned counsel move the Court for an order dismissing the case against the Defendant and as grounds for said motion states the following:

I.

The State's Attorney for Baltimore City, pursuant to a Statement of Charges, has instituted a criminal proceeding charging the Defendant, as follows:

> "On or about June 4, 1979 at 400-402 E. Baltimore St., Inc. did distribute an obscene publication to wit; Swedish Erotica #23 in violation of Ann. Code of Md. Art. 27, Sec. 418."

1. The Statement of Charges is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

2. The statutory provisions of Article 27, Section 15G and Article 19, Section 190 Baltimore City Code, under which the State if proceeding are, as written, repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* because:

(a) Said statutory provisions and the Baltimore City Code are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and, as such, are repugnant to the Due Process provisions of the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States;* and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with speech and communications, presumptively protected under the *First Amendment* and *Fourteenth Amendment;* and further,

(c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials

and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of citizens of the State of Maryland and the United States, as well as the Defendant, in the area of the *First Amendment;* and further,

(d) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the United States Constitution because they permit deprivation of liberty and/or property rights and interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure protected matter the constitutional protection of the *First Amendment* to which it is entitled.

The statutory provisions of Article 27, Section 15G and Baltimore City Code, Article 19, Section 190 are clearly repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* as said provisions have been

applied, construed, and are being applied and construed by the State's Attorney and/or law enforcement officials in the following respects:

(a) That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause necessary for the issuance of the Statement of Charges.

3. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant.

4. That Article 27, Section 15G and Article 19, Section 190, Baltimore City Code, are void for vagueness and overbreadth.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purposes of harassment and the statute and Baltimore City Code, under which the State if proceeding, are void for vagueness and overbreadth and unconstitutional on their face and are being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the Statement of Charges be dismissed.

Respectfully submitted,

s/ Burton W. Sandler
Burton W. Sandler
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 1979, a copy of the aforegoing Motion to Dismiss was mailed prepaid to John Prevas, Assistant State's Attorney, Room 450, Court House, Criminal Courts Building, Calvert and Fayette Streets, Baltimore, Maryland 21202.

s/ Burton W. Sandler
Burton W. Sandler

MOTION TO DISMISS

IN THE CRIMINAL COURT OF BALTIMORE

CASE NO: 47917860

STATE OF MARYLAND

v.

DAVID T. STOUGHTON

Defendant

The Defendant, through undersigned counsel move the Court for an order dismissing the case against the Defendant and as grounds for said motion states the following:

I.

The State's Attorney for Baltimore City, pursuant to a Statement of Charges, has instituted a criminal proceeding charging the Defendant, as follows:

> "On or about June 4, 1979 at 400-402 E. Baltimore St., Inc. did distribute an obscene publication to wit; Swedish Erotica #23 in violation of Ann. Code of Md. Art. 27, Sec. 418."

1. The Statement of Charges is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

2. The statutory provisions of Article 27, Section 15G and Article 19, Section 190 Baltimore City Code, under which the State

if proceeding are, as written, repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* because:

(a) Said statutory provisions and the Baltimore City Code are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and, as such, are repugnant to the Due Process provisions of the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States;* and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with speech and communications, presumptively protected under the *First Amendment* and *Fourteenth Amendment;* and further,

(c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of

citizens of the State of Maryland and the United States, as well as the Defendant, in the area of the *First Amendment;* and further,

(d) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the United States Constitution because they permit deprivation of liberty and/or property rights and interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure protected matter the constitutional protection of the *First Amendment* to which it is entitled.

The statutory provisions of Article 27, Section 150 and Baltimore City Code, Article 19, Section 190 are clearly repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* as said provisions have been applied, construed, and are being applied and construed by the

State's Attorney and/or law enforcement officials in the following respects:

> (a) That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause necessary for the issuance of the Statement of Charges.

3. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant.

4. That Article 27, Section 19G and Article 19, Section 190, Baltimore City Code, are void for vagueness and overbreadth.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purposes of harassment and the statute and Baltimore City Code, under which the State if proceeding, are void for vagueness and overbreadth and unconstitutional on their face and are being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the Statement of Charges be dismissed.

Respectfully submitted,

s/ Burton W. Sandler
Burton W. Sandler
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 1979, a copy of the aforegoing Motion to Dismiss was mailed prepaid to John Prevas, Assistant State's Attorney, Room 450, Court House, Criminal Courts Building, Calvert and Fayette Streets, Baltimore, Maryland 21202.

s/ Burton W. Sandler
Burton W. Sandler

MOTION TO DISMISS

IN THE CRIMINAL COURT OF BALTIMORE

CASE NO. 47915205
47915206

STATE OF MARYLAND

v.

BLOCK NEWS, INC.

Defendant

The Defendant, through undersigned counsel, moves the Court for an order dismissing the case against the Defendant and as grounds for said motion states the following:

I.

The State's Attorney for Baltimore City, pursuant to a Statement of Charges, has instituted a criminal proceeding charging the Defendant, as follows:

> "That the above named Defendant Block News on or about February 28, 1979 at 420 E. Baltimore St. unlawfully did distribute to Detective Danny Brown an obscene publication to wit: "Pretty Girl Film Revue #4" (and #3) on 28 Feb. '79 in violation of Art. 27, Sec. 418,"

1. The Statement of Charges is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

2. The statutory provisions under which the State is proceeding are, as written, repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* because:

a. Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and, as such, are repugnant to the Due Process provisions of the *Fifth* and *Fourteenth Amendments to the Constitution of the United States;* and further,

b. Said statutory provisions are void for overbreadth by means which sweep; unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment* and *Fourteenth Amendment;* and further,

c. The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of

citizens of the State of Maryland and the United States, as well as the Defendant, to publish, distribute, circulate, sell, receive and/or purchase material protected by the *First Amendment*, and further,

d. Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments to the United States Constitution* because they permit deprivation of liberty and/or property rights and interests for the exercise of *First Amendment* rights by unreasonble, arbitrary, and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms, and further,

e. Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments to the Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further

f. That the statutory provisions under which Defendant is being prosecuted on its face deny to Defendant the equal protection of the laws.

3. There was no constitutionally relevant evidence to support probable cause, nor is there any reasonable or probable cause to believe that the material charged under this Statement of Charges is obscene under the *First Amendment* and *Fourteenth Amendments to the Constitution of the United States* in that:

> (a) There was no evidence that the material involved herein exceeds the limits of candor, tolerated in the State of Maryland, in the representation or depiction of matters pertaining to sex and/or nudity.
>
> (b) There was no evidence that the material involved herein appeals to the prurient interest of the average adult intended recipient, or that the prurient appeal was successful.

The Statutory provisions are clearly repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments to the Constitution of the United States* as said provisions have been applied, construed, and are being applied and construed by the State's Attorney and/or law enforcement officials in the following respects:

> a. That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause for the issuance of the Statement of Charges.
>
> b. That in the application of said statute, the State's Attorney did not limit his prosecutorial efforts, as is constitutionally required, to those instances where sexually explicit materials

specifically defined in the State statute, or authoritatively construed, *have been thrust by aggressive sales action upon unwilling recipients, who had in no way indicated any desire to receive or view said materials.*

c. It is respectfully submitted that this Defendant cannot be subjected to prosecution for the sale or exposure of obscene material unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed, and only under circumstances in which sexually explicit materials *have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.*

d. That Defendant herein has by the statute under which it is being prosecuted an affirmative defense to the charges placed against it and is exempt from prosecution herein.

4. That the Statement of Charges and the supporting application for statement of charges does not state a crime as under Article 27, Section 423, the Defendant's actions are permissive and the Statement of Charges is therefore null and void on its face.

5. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant in view of Article 27, Section 423.

Motion to Dismiss

6. That Article 27, Section 418, et seq. is unconstitutional on its face and as applied to the Defendant in that it denies to the Defendant equal protection under the laws and due process of law in violation of his rights under the *First, Fifth* and *Fourteenth Amendments* to the *United States Constitution.*

7. That Article 27, Section 418 et seq. is void for vagueness and overbreadth.

8. That the distribution alleged in the Statement of Charges is a *permissive distribution,* and is not considered criminal activity under Article 27, Section 423.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purposes of harassment and the statute under which the State is proceeding is void for vagueness, unconstitutional on its face and is being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the Statement of Charges be dismissed.

Respectfully submitted,

s/ Burton W. Sandler
Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 17th day of October, 1979 a copy of the aforegoing Motion to Dismiss was mailed postage prepaid to John Prevas, Assistant State's Attorney, Room 309, Criminal Courts Building, Calvert and Fayette Streets, Baltimore, Maryland, 21202.

s/ Burton W. Sandler
Burton W. Sandler

MOTION TO DISMISS

IN THE CRIMINAL COURT OF BALTIMORE

CASE NO. 47915227
47915228

STATE OF MARYLAND

v.

PHILLIP D. LONG

Defendant

The Defendant, through undersigned counsel, moves the Court for an order dismissing the case against the Defendant and as grounds for said motion states the following:

I.

The State's Attorney for Baltimore City, pursuant to a Statement of Charges, has instituted a criminal proceeding charging the Defendant, as follows:

> "That the above named Defendant Phillip David Long on or about February 28, 1979 at 420 E. Baltimore St. unlawfully did distribute to Detective Danny Brown an obscene publication to wit: "Pretty Girl Film Revue #4" (and #3) on 28 Feb. '79 in violation of Art. 27, Sec. 418,"

1. The Statement of Charges is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

Motion to Dismiss

2. The statutory provisions under which the State is proceeding are, as written, repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* because:

a. Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and, as such, are repugnant to the Due Process provisions of the *Fifth* and *Fourteenth Amendments to the Constitution of the United States;* and further,

b. Said statutory provisions are void for overbreadth by means which sweep; unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment* and *Fourteenth Amendment;* and further,

c. The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of

citizens of the State of Maryland and the United States, as well as the Defendant, to publish, distribute, circulate, sell, receive and/or purchase material protected by the *First Amendment*, and further,

d. Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments to the United States Constitution* because they permit deprivation of liberty and/or property rights and interests for the exercise of *First Amendment* rights by unreasonble, arbitrary, and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms, and further,

e. Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments to the Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further

f. That the statutory provisions under which Defendant is being prosecuted on its face deny to Defendant the equal protection of the laws.

3. There was no constitutionally relevant evidence to support probable cause, nor is there any reasonable or probable cause to believe that the material charged under this Statement of Charges is obscene under the *First Amendment* and *Fourteenth Amendments to the Constitution of the United States* in that:

> (a) There was no evidence that the material involved herein exceeds the limits of candor, tolerated in the State of Maryland, in the representation or depiction of matters pertaining to sex and/or nudity.
>
> (b) There was no evidence that the material involved herein appeals to the prurient interest of the average adult intended recipient, or that the prurient appeal was successful.

The Statutory provisions are clearly repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments to the Constitution of the United States* as said provisions have been applied, construed, and are being applied and construed by the State's Attorney and/or law enforcement officials in the following respects:

> a. That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause for the issuance of the Statement of Charges.
>
> b. That in the application of said statute, the State's Attorney did not limit his prosecutorial efforts, as is constitutionally required, to those instances where sexually explicit materials

specifically defined in the State statute, or authoritatively construed, *have been thrust by aggressive sales action upon unwilling recipients, who had in no way indicated any desire to receive or view said materials.*

c. It is respectfully submitted that this Defendant cannot be subjected to prosecution for the sale or exposure of obscene material unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed, and only under circumstances in which sexually explicit materials *have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.*

d. That Defendant herein has by the statute under which it is being prosecuted an affirmative defense to the charges placed against it and is exempt from prosecution herein.

4. That the Statement of Charges and the supporting application for statement of charges does not state a crime as under Article 27, Section 423, the Defendant's actions are permissive and the Statement of Charges is therefore null and void on its face.

5. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant in view of Article 27, Section 423.

Motion to Dismiss

6. That Article 27, Section 418, et seq. is unconstitutional on its face and as applied to the Defendant in that it denies to the Defendant equal protection under the laws and due process of law in violation of his rights under the *First, Fifth* and *Fourteenth Amendments* to the *United States Constitution*.

7. That Article 27, Section 418 et seq. is void for vagueness and overbreadth.

8. That the distribution alleged in the Statement of Charges is a permissive distribution, and is not considered criminal activity under Article 27, Section 423.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purposes of harassment and the statute under which the State is proceeding is void for vagueness, unconstitutional on its face and is being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the Statement of Charges be dismissed.

Respectfully submitted,

s/ Burton W. Sandler
Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of October, 1979 a copy of the aforegoing Motion to Dismiss was mailed postage prepaid to John Prevas, Assistant State's Attorney, Room 309, Criminal Courts Building, Calvert and Fayette Streets, Baltimore, Maryland, 21202.

s/ Burton W. Sandler
Burton W. Sandler

MOTION TO DISMISS

IN THE CRIMINAL COURT OF BALTIMORE

CASE NO. 01-1601-891

STATE OF MARYLAND

v.

DEBORAH ROYOLA REDDING

Defendant

The Defendant, through undersigned counsel, moves the Court for an order dismissing the case against the Defendant and as grounds for said motion states the following:

I.

The State's Attorney for Baltimore City, pursuant to a Statement of Charges, has instituted a criminal proceeding charging the Defendant, as follows:

> "That the above named Defendant Deborah Royola Redding on or about November 16, 1979 at 420 E. Baltimore St. did knowingly and willingly distribute an obscene publication to wit: American Erotica Suckers to Det. Sgt. E.P. Husok in violation of Ann. Code of Md. Art. 27, Sec. 418,"

1. The Statement of Charges is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

2. The statutory provisions under which the State is proceeding are, as written, repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* because:

a. Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and, as such, are repugnant to the Due Process provisions of the *Fifth* and *Fourteenth Amendments to the Constitution of the United States;* and further,

b. Said statutory provisions are void for overbreadth by means which sweep; unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment* and *Fourteenth Amendment;* and further,

c. The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of

citizens of the State of Maryland and the United States, as well as the Defendant, to publish, distribute, circulate, sell, receive and/or purchase material protected by the *First Amendment*, and further,

d. Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments to the United States Constitution* because they permit deprivation of liberty and/or property rights and interests for the exercise of *First Amendment* rights by unreasonble, arbitrary, and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms, and further,

e. Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth* and *Fourteenth Amendments to the Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further

f. That the statutory provisions under which Defendant is being prosecuted on its face deny to Defendant the equal protection of the laws.

3. There was no constitutionally relevant evidence to support probable cause, nor is there any reasonable or probable cause to believe that the material charged under this Statement of Charges is obscene under the *First Amendment* and *Fourteenth Amendments to the Constitution of the United States* in that:

(a) There was no evidence that the material involved herein exceeds the limits of candor, tolerated in the State of Maryland, in the representation or depiction of matters pertaining to sex and/or nudity.

(b) There was no evidence that the material involved herein appeals to the prurient interest of the average adult intended recipient, or that the prurient appeal was successful.

The Statutory provisions are clearly repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments to the Constitution of the United States* as said provisions have been applied, construed, and are being applied and construed by the State's Attorney and/or law enforcement officials in the following respects:

a. That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause for the issuance of the Statement of Charges.

b. That in the application of said statute, the State's Attorney did not limit his prosecutorial efforts, as is constitutionally required, to those instances where sexually explicit materials

specifically defined in the State statute, or authoritatively construed, *have been thrust by aggressive sales action upon unwilling recipients, who had in no way indicated any desire to receive or view said materials.*

c. It is respectfully submitted that this Defendant cannot be subjected to prosecution for the sale or exposure of obscene material unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed, and only under circumstances in which sexually explicit materials *have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.*

d. That Defendant herein has by the statute under which it is being prosecuted an affirmative defense to the charges placed against it and is exempt from prosecution herein.

4. That the Statement of Charges and the supporting application for statement of charges does not state a crime as under Article 27, Section 423, the Defendant's actions are permissive and the Statement of Charges is therefore null and void on its face.

5. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant in view of Article 27, Section 423.

Motion to Dismiss

6. That Article 27, Section 418, et seq. is unconstitutional on its face and as applied to the Defendant in that it denies to the Defendant equal protection under the laws and due process of law in violation of his rights under the *First, Fifth* and *Fourteenth Amendments* to the *United States Constitution.*

7. That Article 27, Section 418 et seq. is void for vagueness and overbreadth.

8. That the distribution alleged in the Statement of Charges is a *permissive distribution,* and is not considered criminal activity under Article 27, Section 423.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purposes of harassment and the statute under which the State is proceeding is void for vagueness, unconstitutional on its face and is being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the Statement of Charges be dismissed.

Respectfully submitted,

s/ Burton W. Sandler
Burton W. Sandler
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 28th day of December, 1979 a copy of the aforegoing Motion to Dismiss was mailed prepaid to Roman Choma, Assistant State's Attorney, Room 454, Court House, Lexington and St. Paul Streets, Baltimore, Maryland, 21202.

s/ Burton W. Sandler
Burton W. Sandler

Opposition

Office - Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

400 E. BALTIMORE STREET INC., BLOCK NEWS, INC., PHILLIP DAVID LONG, THOMAS F. CRAIG, JOSEPH D. STEPHENS, DAVID THOMAS STOUGHTON, CHARLES BOOKS, INC., DEBORAH RAYOLA REDDING a/k/a DEBORAH RAYOLA PIERCE,

Petitioners,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General of Maryland
DEBORAH K. HANDEL,
Chief, Criminal Appeals Division
PATRICIA E. McDONALD,
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Attorneys for Respondents.

QUESTIONS PRESENTED

1. Whether it is necessary or desirable for this Court to review this case when there has been no conviction or sentence amounting to a final judgment?

2. Whether it is necessary or desirable for this Court to address the issue as to whether the Maryland Annotated Code, Article 27, §423 is void for vagueness when this issue was not decided by either the trial or the appellate courts of the State of Maryland?

3. Whether it is necessary or desirable for this Court to review the dicta of the Court of Special Appeals concerning the operation and constitutionality of the Maryland Annotated Code, Article 27, §§418 and 423?

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NO. 81-902

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

400 E. BALTIMORE STREET INC., BLOCK NEWS, INC., PHILLIP DAVID LONG, THOMAS P. CRAIG, JOSEPH D. STEPHENS, DAVID THOMAS STOUGHTON, CHARLES BOOES, INC., DEBORAH RAYOLA REDDING a/k/a DEBORAH RAYOLA PIERCE,

Petitioners,

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioners reproduced in the Appendix the decision of the Court of Special Appeals of Maryland and the denial of the Petition for Writ of Certiorari to the Court of Special Appeals by the Court of Appeals of Maryland.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257.

STATE STATUTES

Annotated Code of Maryland, Article 27, §§418 and 423 (hereinafter referred to as §418 and §423).

Maryland Rules of Procedure, Rule 1085.

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendments I, IV, V and XIV.

Respondent accepts the presentation of the constitutional and statutory provisions in the Petitioners' Appendix. (Pet. Apx. 31a – 32a) with the addition of Maryland Rules of Procedure, Rule 1085, reproduced in the Appendix at Apx. 27.

STATEMENT OF THE CASE

The instant petition seeks review of the decision of the Court of Special Appeals of Maryland which reversed and remanded a judgment that Petitioners were in violation of §418.

Petitioners were charged with violating §418 in connection with the sale and distribution of obscene publications. The cases proceeded on an agreed statement of facts along with certain exhibits.

An extensive discussion of facts upon which the convictions were presented to the trial court and in

reproduced in the appendix. The following is a summary of facts for the purpose of this Court's review.

Petitioner's bookstores displayed cellophane wrapped magazines. On several occasions, plainclothes policemen entered the stores and purchased magazines.[1] Throughout the stores signs were posted stating that, "(t)he material sold in this store is sold only for scientific, educational, governmental or other similar justification and the customers agree that they are purchasing these materials only for scientific, educational, governmental or other similar justification" or words of similar import. The officers were not asked whether, in fact, they were purchasing the magazines for such purposes, nor did the officers volunteer their purposes for making the purchases. The magazines were taken to a judge, who found them to be obscene and issued arrest warrants for the Petitioners. (Apx. 1-14).

Hearings were held on March 25, 1980, June 16, 1980 and November 3, 1980. On November 3, 1980, the Criminal Court of Baltimore (Figinski, J.) convicted and fined each Petitioner $500. (Apx. 15, 21-25). Petitioners appealed and on June 8, 1981, the Court of Special Appeals reversed the convictions and remanded the cases for retrial, because the trial court had failed to reach an express finding of fact that

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[1]The magazines were entitled, "Pretty Girl", "Filth Review", "Swedish Erotica", "Wet", "Hot Baby", "Route Sixty Sex", and "American Erotica". (Pet. App. 2a and 3a).

the publications were obscene. (Pet. App. 1a - 25a). The Petition for Writ of Certiorari to the Court of Special Appeals was denied on September 29, 1981. (Pet. App. 26a).

SUMMARY OF ARGUMENT

1. There is no final judgment to review as Petitioners have not been convicted of any offenses.

2. Section 423 is constitutionally valid and not void for vagueness.

3. The mere posting of signs purportedly characterizing obscene material as governmental, scientific or educational in nature does not bring Petitioner's activities within the protection of §423 as a matter of law.

4. Section 423 does not create arbitrary classifications of persons entitled to possess pornography.

5. Obscene material is not changed into non-obscene material by virtue of §423.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THERE HAS BEEN NO FINAL JUDGMENT IN THAT THE PETITIONERS HAVE NOT YET BEEN CONVICTED OF ANY OFFENSES, AND THE CONSTITUTIONAL ISSUES RAISED BY THE PETITIONERS WERE MERELY ADDRESSED IN DICTA BY THE COURT OF SPECIAL APPEALS.

The Court of Special Appeals reversed the judgment of the trial court fining each Petitioner $500 and remanded the case for retrial since the trial court had failed to find that

the magazines were obscene. Petitioners have yet to be retried and have not been convicted of any offenses. The Petition for Writ of Certiorari should be denied because there is no final judgment as required as a jurisdictional predicate of 28 U.S.C. §1257.

A judgment is final when litigation is terminated between the parties. In a criminal case the sentence is the final judgment. Berman v. United States, 302 U.S. 211, 212 (1937). In Parr v. United States, 351 U.S. 513 (1956) the dismissal of an appeal was affirmed based on the fact that there was no final judgment. In holding that there was no final judgment, this Court stated, "...petitioner has not yet been tried, much less convicted and sentenced." 351 U.S. at 518.[2] Here, as in Parr, the Petitioners have not yet been convicted and sentenced. The publications which are the basis of the case have not been determined to be obscene.

The issues raised by Petitioners as to the constitutionality of §§423 and 418 were addressed by the Court of Special Appeals of Maryland only in dicta since the cases were reversed and remanded. (Pet. 8a - 9a). Review of the constitutional questions raised by Petitioners would be

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[2]The exception to the finality rule as expressed in Brady v. Maryland, 373 U.S. 83 (1963) is not applicable in this case. In Brady the order for new trial limited to the issue of punishment was reviewable, when the question was whether the defendant was entitled to a new trial on both the question of guilt and punishment. Here, the order remanding the case was for a determination of both guilt and punishment.

premature given that these issues were only addressed by the intermediate appellate court in dicta. The opinion of the Court of Special Appeals as to these issues was only given as guidance to the trial court pursuant to Maryland Rule of Procedure, Rule 1085. Review by this Court would not be necessary or desirable given that the discussion of the constitutionality of §§418 and 423 in this case was only made by the Maryland court by way of dicta.

II.

THE ISSUE AS TO WHETHER §423 IS VOID FOR VAGUENESS WAS NOT RAISED IN THE COURTS BELOW. AT ANY RATE, §423 IS CONSTITUTIONALLY VALID.

Petitioners argue that §423 is void for vagueness in that it does not set forth the procedures necessary for persons to bring themselves within its ambit. (Pet. 6).

Although Petitioners questioned the constitutionality of §423 in the Court of Special Appeals, they did not raise the issue that this section was void for vagueness (Pet. 33a), and therefore, the Court of Special Appeals did not address this issue (Pet. 9a and 25a). Respondent submits that because the issue as to the alleged void for vagueness was not presented for appellate review in the courts of Maryland, it is not now proper to raise it in this Court, and the Petition for Certiorari should be denied for this reason. Adickes v. Kress and Co., 398 U.S. 144, 147, n. 2 (1970); United States v. Lovasco, 431 U.S. 783, 788, n. 7 (1977); California v. Taylor, 353 U.S. 553, 557, n. 2 (1957).

Even if this Court were to address this issue, Respondent asserts that §423 is constitutionally correct and not void for vagueness.

In assessing whether a statute is void for vagueness, courts generally consider two criteria: (a) whether there is sufficient notice as to the prohibited conduct; and (b) whether there are standards sufficient to guide those persons charged with enforcing the law. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Construction Company, 269 U.S. 385, 391 (1926); Bowers v. State, 283 Md. 115, 121-122 (1978). The decision whether a statute is void for vagueness is made solely on the basis of the statute's application to the particular facts at hand, and is not affected by the application of the statute to a foreseeable marginal situation unless the statute appears to intrude upon fundamental constitutional liberties. United States v. Powell, 423 U.S. 87, 92 (1975). Since obscene materials are not protected by the First Amendment, Miller v. California, 413 U.S. 15, 23 (1973), this statute is to be examined based on the particular facts at hand.[3]

---

[3]Assuming, arguendo, First Amendment rights are implicated, the void for vagueness analysis would be essentially the same except the statute is to be tested on its face. Smith v. Goguen, 415 U.S. 566 (1974). Respondent would submit that even under the stricter standard, §423 is valid.

Section 423 is not void for vagueness in that a definite course of conduct is forbidden: the sale and distribution of obscene material. Section 423 also sets forth standards for an exemption from the criminal prohibitions and penalties for selling and distributing obscene material. This exemption covers persons having bona fide scientific, educational, governmental or similar justification for possession or distribution of such material. There is nothing vague about this exemption. Cf Sanza v. Maryland Board of Censors, 245 Md. 319, 340-341 (1967) (holding a similar exemption under the Annotated Code of Maryland, Article 66A, §23 is constitutionally valid in that it is to be read as allowing the showing films by non-profit organizations). Cf. Modern Social Education, Inc. v. Preller, 353 F.Supp. 173, 181-183 (D.Md. 1973), aff'd in part, rev'd in part (on other grounds), 512 F.2d 1241 (4th Cir. 1975) (holding that the exemption provided in Annotated Code of Maryland, Article 66A, §23 does not raise constitutional issues but rather raises a factual question to be determined by the state courts). Cases from the only other state which has examined the constitutionality of a statute granting an exemption to the distribution of obscene materials has concluded that a version similar to that employed by the Maryland Legislature is constitutionally broad but not overbroad or vague. State v. Starr Enterprises, Inc., 597 P.2d 1098, 1100-1102 (Kan. 1979); State v. Next Door Cinema Corp., 587 P.2d 326, 329 (Kan. 1978).

Petitioners claim that signs alleging the material to be educational or scientific is not persuasive. Here, the signs were posted in stores that primarily sell, for commercial exploitation, sexual goods and pornography. The signs were found by the trial court to be a "...flimsy facade erected to escape prosecution." Modern Social Education, Inc. v. Preller, 353 F.Supp. at 182 (Apx. at 21-23).

III.

THE COURT OF SPECIAL APPEALS WAS CORRECT IN STATING IN DICTA THAT THE MERE POSTING OF SIGNS IN A STORE LOADED PRIMARILY WITH PORNOGRAPHIC MATTERS WAS INSUFFICIENT TO MAKE SECTION 423 APPLICABLE AS A MATTER OF LAW.

Petitioners argue that the courts below were incorrect in determining the mere posting of signs within the bookstores was not sufficient as a matter of law to bring their activities within the exemption established by §423. (Pet. 33a).

The Court of Special Appeals stated in dicta that the mere posting of signs in a book store loaded with pornography could not as a matter of law bring Petitioners within the exemption of §423. (Pet. Apx. at 27a). The question as to whether Petitioners fall within the exemption of §423 requires a factual determination which should be left to the State courts to decide after all the evidence is heard. Modern Social Education, Inc. v. Preller, 353 F.Supp. at 182. The Court of Special Appeals dicta that §423 was not

applicable as a matter of law does not raise an issue of constitutional dimension and therefore, the Petition for Certiorari should be denied as neither necessary nor desirable.

IV.

SECTION 423 AVOIDS CREATING ARBITRARY CLASSIFICATIONS OF PERSONS ENTITLED TO POSSESS OBSCENE MATERIAL.

Petitioners' argument that §423 violates the equal protection clause is without merit. Petitioners' argument is predicated upon the proposition that §423 creates a distinction "...between certified scientists, teachers, students or government officers on the one hand and the individual who seeks to conduct his own education." (Pet. at 13).

First, Petitioners lack standing to raise this issue because the finding of guilt did not avert to this allegedly invidious distinction; rather, the finding of guilt was made because the trial court felt that the signs did not bring the Petitioners within the exemption of §423. Further, there was no evidence taken tending to demonstrate that there was no rational basis for the purported distinction. (Apx. 1-14). The only evidence presented to the trial court was contained in the statement of facts; the remainder of the hearings were devoted to arguments of counsel. The case is not in a posture for a review based on an equal protection argument.

Assuming, arguendo, that the issue of the alleged violation of the Equal Protection Clause were to be addressed by this Court, it is clear that §423 is constitutional.

The test to be applied in analyzing an equal protection challenge where suspect categories or fundamental rights are not implicated is whether the legislative classification is rationally related to a legitimate government interest and if so, the classification must be sustained. Barry v. Barchi, 443 U.S. 55 (1979); Dandridge v. Williams, 397 U.S. 471 (1970); Vance v. Bradley, 440 U.S. 93 (1979). If a statute does not burden a suspect group or impinge upon a fundamental right, courts will not

> "...overturn such a statute unless the varying treatment of the different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we (the courts) can only conclude that the Legislature's actions were irrational." Vance v. Bradley, 440 U.S. at 97.

The sale of obscene material is not a fundamental right; nor are the sellers of it a suspect category. Persons having bona fide scientific, educational, governmental, or other similar justification is a valid classification related to legitimate government interest. See, Sanza v. Maryland State Board of Censors, 245 Md. 319, 341 (1967); State v. Starr Enterprises, Inc., 597 P. 2d 1098 (Kan. 1979); State v. Next Door Cinema Corp, 587 P. 2d 326 (Kan. 1978); People v. Ilardo, 423 N.Y.S.2d 470 (1979); Modern Social Education, Inc. v. Preller, 353 F.Supp. 173 (D.Md. 1973), aff'd in part, rev'd in part (on other grounds), 512 F.2d 1241 (4th Cir. 1975).

V.

THE EXEMPTION FROM CRIMINAL RESPONSIBILITY OF CERTAIN POSSESSORS AND DISTRIBUTORS OF OBSCENE MATERIAL DOES NOT ALTER THE OBSCENE NATURE OF THE MATERIALS THEMSELVES AND THUS, §418 IS NOT MADE UNCONSTITUTIONAL BY VIRTUE OF §423.

Petitioners lastly contend that §418 is unconstitutional because of the alleged conflict with the exemption section thereof (§423). Petitioners misapprehend the import of the exemption law. The exemption does not alchemically transform the base pornographic materials into glittering artistic expression, protected by the First Amendment. Rather, the statutory exemption leaves intact the obscene nature of the material, but insulates its custodians from criminal responsibility for dissemination of it, under certain circumstances.

The character of the magazines which were introduced into evidence before the trial court never changed; the character of their use may have served to insulate its distributors from conviction, had the distribution fit within the guidelines declared under §423. As argued hereinabove, Petitioners raise a factual, not a constitutional issue. The determination as to whether an individual falls within the exemptions is a factual one to be raised as a defense in the trial court. Therefore, an issue of constitutional dimension has not been presented to this Court and the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent requests that this Court deny the Petition for Writ of Certiorari to review the decision at the Court of Special Appeals of Maryland.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. HANDEL,
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Attorneys for Respondents

MR. PREVAS: No, Your Honor.

THE COURT: You all may be seated back in the audience if you wish.

MR. PREVAS: Prior to giving first the Statement of Facts, the statement of the defense by agreement with consent of the defendants have agreed in every case except for that in Debbra Redding to amend the charging document as follows, before the words distributed, the word knowingly would be entered by interlineation. May it show on the document, the amended charging document to enter the word knowingly before the word distributed.

THE COURT: Add the word knowingly to distributed.

MR. PREVAS: Now, the Statement of Facts are as follows, Your Honor, first of all with respect to Debbra Redding, the testimony would be as follows.

Detective Eric Hasek of the Baltimore City Police Department, Vice-Prostitution Unit would testify that on the 19th of November, 1979 at 1:30 in the evening he had occasion to be in the 400 block of East Baltimore Street which he would describe, which is in the City of Baltimore which he would describe as part of the adult entertainment district. He indicated various buildings of flashing lights there. There are night clubs that have pictures of women in various stages of undress and I would indicate that he went to 420 East

Baltimore Street which is, which advertises as an adult book store. He would testify that when he entered the premises that along both walls of the building are displays indicating numerous magazines of a sexual nature. Each were wrapped in cellophane.

He would testify there is a counter and there was a clerk at the counter and there were no other employees in the store. He would testify that he went into the body of the store and looking at all of the various items being displayed he selected one. He looked at the covers of various items that were all up for display and he selected one which was representative of the general nature of them.

He took that item still wrapped in cellophane where he laid the wrapped, sealed item in front of the counter in front of Debbra Redding whom he had identified as being the person in the courtroom today. He placed it on the counter, that she quoted him the price which is $8.00 that he purchased the item from her, giving cash for the item. There being no discussion other than the quoting of the price and at that time he removed it from the premises and returned with an arrest warrant.

For he would offer the magazine that he purchased as State's Exhibit Number One. He would further testify when he was standing at the same counter as the Clerk he exhibited only this Statement of Facts. He would testify that he was standing

at the counter with the Clerk, he could see all of the various items that were being displayed throughout the store standing at that position. That would complete the Statement of Facts as to Debbra Redding.

THE COURT: With respect to State's Exhibit One, it will be admitted.

WHEREUPON, STATE'S EXHIBIT NUMBER ONE WAS MARKED INTO EVIDENCE.

MR. PREVAS: That will be the Statement of Facts for Debbra Redding.

THE COURT: Very erotic number 104.

MR. PREVAS: The next Statement of Facts would be as follows:

Detective Melvin Kal - -

THE COURT: What case is this?

MR. PREVAS: This is Thomas Craig and the Block News Incorporated.

Detective Melvin k-a-l-b-a-u-g-h, Kalbaugh testified that he is an officer of the Baltimore City Police Department assigned to the Vice-Gambling Unit. He would testify that on the 9th of May, 1979 at 1:35 in the afternoon, he had occasion to go, 9th of May, 1979 he had occasion to go to 400 East Baltimore Street which he would describe as an adult entertainment district as described in the Statement of Facts.

He would testify he went to 420 East Baltimore Street which clearly advertises to be an adult book store. Upon entar-

ing the premises, he observed numerous display racks indicating magazines which were sealed in plastic and which indicated from the covers that they were of an explicit sexual nature. After perusing the various displays, he selected what will be State's Exhibit One on this Statement of Facts - "Swedish Erotica."

THE COURT: It is a different Statement of Facts, you will be getting confused down at the Court of Appeals? This will be State's Exhibit Two - "Swedish Erotica." Number Two.

WHEREUPON, STATE'S EXHIBIT NUMBER TWO WAS MARKED INTO EVIDENCE.

MR. PREVAS: Which he would testify was wrapped in plastic. He would testify that at that time he took it from the display rack to the desk and he would identify the defendant, Thomas Craig seated in the courtroom as the clerk who waited on him at that time. He would testify there was no conversation with Mr. Craig, that of course Detective Kalbaugh was in plainclothes and he was acting as a member of the general public, was quoted by Mr. Craig the price of the magazine which was $7.50 which he paid for with U.S. currency. He would testify at that time Mr. Craig then placed State's Exhibit Number Two in a plain brown bag and turned it over to him. He was at that time asked to identify himself and said his name was Thomas Craig.

Detective Kalbaugh would testify he proceeded in

District Court after presenting the magazine to Judge Joseph Ciatola, a warrant was issued and he returned to the premises and it is stipulated that William Shumaker of the State Department of Assessments and Taxation would testify that the corporation that does business at 420 East Baltimore Street is Block News, Incorporated.

The State's Exhibit Number - -

THE COURT: Is Mr. Craig an employee of Block News? Was he the person at the counter? Is that correct?

MR. PREVAS: Yes, sir. The next case Your Honor, would be David Thomas Stoughton, 400 East Baltimore Street, Incorporated.

The testimony would be as follows: Sergeant Bruce Pottem would testify he is a Baltimore City Police Officer assigned to the Vice and Gambling Unit. He would testify on the 4th of June, 1979 that in civilian clothes, he went to 400 block East Baltimore Street which has been described as in the previous statement of facts that he went to 400 East Baltimore Street which advertises as an adult book store.

Entering the premises, he observed numerous racks with magazines sealed in plastic envelopes that are displayed along both walls of the premises. He would testify that they contain magazines which covers, which indicated that they were of an explicit sexual nature. He selected State's Exhibit Number Three, "Swedish Erotica Number 23," as a representative sample

of that display and he took it to the counter to the Clerk whom he would identify as the defendant, David Thomas Stoughton who is seated in the courtroom today. That, at that time he indicated that he wanted to purchase the magazine, that Mr. Stoughton received his money after it was established that the price was $6.00.

Mr. Stoughton placed the magazine in a plain paper bag and gave the same to the officer in return for the currency, that there was no further conversation, that he did not want to represent himself to be a police officer or any other governmental agent. He would testify that while waiting at the counter with Mr. Stoughton, he could see the entire display area of all of the counters in the store. He would testify that after purchasing "Swedish Erotica Number 23," he went to the District Court, Central District and Judge Joseph Ciotola made a determination that the magazine was obscene. He obtained an arrest warrant, Mr. William Shumaker from the State Department of Assessments and Taxation would testify that the corporation to do business at 400 East Baltimore Street is 400 East Baltimore Street, Incorporated. That is the State's Exhibit Number Three.

WHEREUPON, STATE'S EXHIBIT NUMBER THREE, WAS MARKED INTO EVIDENCE.

THE COURT: And was Mr. Stoughton an employee of East Baltimore Corporation, is that correct?

MR. PREVAS: That's correct. The next case

is State of Maryland vs. Joseph D. Stephens and Charles Books, Incorporated.

Detective Eric Husok of the Baltimore City Police Department would testify that the 15th of May, 1979 at 3:15 in the afternoon, he had occasion to go to the book store of Charles Books, Incorporated, 1827 North Charles Street.

He would testify that the 1800 block of North Charles Street is in the City of Baltimore, and there are a number of places of adult entertainment on that block, a lot of flashing lights and it is not in the adult entertainment zone. It is not in the City Council's Adult Entertainment zone but there are places of entertainment in this block that are bars, night clubs, with dancing go-go girls, advertisement on the outside, there are a number of books stores that advertise themselves to be adult book stores.

He went into one of them which is 1827 North Charles and upon entering it he observed there were numberous display counters indicating numerous magazines which were sealed in plastic envelopes, which appeared from the covers to be of an explicit sexual nature for sale. He would testify that after looking through the entire sample, pretending he was a customer, he was in civilian clothes, he selected one which would be State's Exhibit Number Four as a representative of the sample of what was on the display which he would so identify.

He would so identify this was a package of three. He would so identify as follows, State's Exhibit Number Four - package of three.

THE COURT: They are all four, put them back in the bag. "Wet" is the first one, "Hot Baby" is the second one, and "Route Sixty Sex" is the third one.

MR. PREVAS: He would testify that at that time he went to the counter where he observed the defendant Joseph Stephens was the clerk. He would testify that he gave the items to the Clerk and that the Clerk indicated the price which was $10.00, excuse me, three, for $9.95. And that there was no other conversation other than the price. He would testify that the price was quoted to him by Mr. Stephens - three for $9.95 which he paid for with U.S. currency and that the items were placed in a brown paper bag for him at the time. He was standing next to Mr. Stephens at that time, at the counter, so he could see the entire premises and he could see all of the various items on display from Mr. Stephens' vantage point at the counter.

He would testify that he took the items to Central District where Judge Ciatola made a preliminary determination that they were obscene, at which time he returned with an arrest warrant for Mr. Stephens and William Shumaker of the State Department of Assessments and Taxation would testify that Charles Books, Incorporated, is a corporation licensed to do

business at 1827 North Charles Street and that Mr. Stephens is an employee thereof. All events occurred in the City of Baltimore. State's Exhibit Number Four.

WHEREUPON, STATE'S EXHIBIT NUMBER FOUR, WAS MARKED INTO EVIDENCE.

Phillip Long and Block News, Incorporated - Detective Danny Brown, C.I.D., Vice-Prostitution Unit would testify that on the 28th day of February, 1979 at 11:45 A.M., he has occasion to go to 420 East Baltimore Street which is in the 400 block of East Baltimore Street which has previously been described in the earlier Statement of Facts that he would testify that 420 East Baltimore Street advertises itself on the front as an adult book store.

He entered the book store. He observed numerous racks indicating various items which purported from their covers to be explicit sexual nature, displayed all along the store. He selected State's Exhibit Number Five, which is two magazines as representative of the items that were on display. He would testify that he purchased each of the two magazines from Phillip David Long whom he would identify as being the defendant seated in the courtroom who is the clerk at the counter.

He would testify that the only conversation that occurred between himself and Mr. Long was the quoting of the price of the magazines which was $4.00 for "Pretty Girl Film Review", double feature issue and $6.00 for "Pretty Girl Film

Review Three,' feature length issue. He would testify that he was in civilian clothes at the time that he made the purchase. After making the purchase that he took the magazines to Judge Joseph Ciatola who made an Ex Parte determination of their obscenity.

He returned with an arrest warrant. He would further testify that he was at the counter with Mr. Long, he would have observed from the vantage point of the counter - displays of the various items. He would testify that other than the quoting of the price there was no conversation with Mr. Long and Mr. William Shumaker of the State Department of Assessments and Taxation would testify that the corporation licensed to do business at 2420 East Baltimore Street is Block News, Incorporated and that Mr. Long is an employee.

The State would offer the magazines as State's Exhibit Number Five.

THE COURT: Mark them 5A and B.

WHEREUPON, STATE'S EXHIBITS NUMBERS FIVE A & FIVE B WERE MARKED INTO EVIDENCE.

MR. PREVAS: I believe that that covers all of the defendants.

THE COURT: Is that it Mr. Prevas?

MR. PREVAS: Yes, Your Honor.

MR. SANDLER: Your Honor, we'd like on the part of the defense to sort of add a few things to the State-

ment of Facts, that is, if each and every one of the defendants were to testify, if the Court requires that I name each of them, I will but they would testify that in the event that if either one of these police officers would have indicated to them that they were not purchasing the material selected by them for the reasons set forth on the sign that they would have refused to accept their money in connection with the purchase being made.

In addition - -

THE COURT: They'd also testify that I am sure that it would have to affirmatively come from the purchaser and not as anything that they inquired into?

MR. SANDLER: No, sir.

THE COURT: They would testify that they didn't make any inquiry, did they?

MR. SANDLER: I don't believe the testimony would believe that they made any inquiry. I believe they did that indirectly through the signs.

THE COURT: We have got to get the signs in there yet.

MR. SANDLER: But as of right now, each and every witness in the event either police officer would have indicated it was not for the purpose on the signs, they wouldn't have sold it.

THE COURT: But they also wouldn't have volunteered the question?

MR. SANDLER: That's correct. They would testify, Your Honor, that I believe the additional testimony in the case would be if the police officers were to testify, under cross-examination that they would freely admit that the signs were existing in the store in places where they indicated and from their vantage point as the State has indicated.

In addition to being able to see the other material in the store, they would be able to see the signs.

THE COURT: Whether the police officer would admit on cross-examination it is something which you would prove as part of your case.

MR. SANDLER: I think in all fairness, the defendant's Statement of Facts says they could see the other material from their vantage point and also see the signs.

THE COURT: The signs aren't as colorful. The signs are in black and white, the other things are in color.

MR. SANDLER: I think some of the signs may be in color.

THE COURT: Well, they don't show up that way here.

MR. SANDLER: We didn't take color photos. These are black and white. I think the signs are printed in color.

THE COURT: Either way.

MR. SANDLER: In addition, Your Honor the Statement of Facts should include the fact that the exhibits substantiate the fact there were signs throughout the store indicating that the material that is being sold in this store is being sold for scientific, governmental, educational or other similar justifications and also there was a sign at the entrance and at the cash registar where the purchaser pays his money whereby he agrees that he is purchasing the material selected by him or her for scientific, education, governmental or other similar justification and Your Honor, I sort of place some emphasis on the other similar justification for lack of any additional communication between the parties.

THE COURT: One additional fact I think that should be included. I don't think that that phrase gets a bit more significant by silence. I think that that phrase is totally within the concept of the other of sjusdem generis, you have argued it a couple of times Mr. Sandler, I think I have got the drift of your argument. We are going to have plenty of opportunity for additional argument.

MR. SANDLER: Yes, sir.

MR. PREVAS: I don't want the Court to, well in addition to the additional facts it should be that the material was purchased with money from a police fund just so that the record reflects clearly, the police officers were allocated in the vice unit a certain amount of money to make

purchases in the area of obscenity and gambling and prostitution money. This general fund was used to make this evidentiary purchase. In, addition, I think the factual situation should contain at that time.

MR. SANDLER: The Defense would produce evidence from the police officers to the effect that they are an arm of the Government of the State of Maryland for the City of Baltimore and that in addition to the statement as set forth which states that they purchased the materials for evidence, I think the evidence or the facts should show this Court that they also purchased the material for governmental purpose. That is where we are.

Now, Your Honor, away from the Statement of Facts so that I don't mislead this Court, please let me apologize if I have created the impression that this defense rests solely on the facts that it is our position that the material is materials purchased for strictly governmental purposes.

THE COURT: No, I understand that completely. You certainly don't have to apologize. Is there anything else?

MR. SANDLER: No, sir.

THE COURT: Gentlemen, what I will do, you will make a Motion for Judgment of Acquittal, I would assume?

MR. SANDLER: I would, sir.

THE COURT: And I will reserve on that as well as on the Motion to Dismiss and the Motion to Suppress.

P R O C E E D I N G S

THE COURT: Now, we have here cases - 47917956 - State versus Charles Books, Inc.; 47915745 - State versus Stephens; case number 47915555 - State versus Thomas Craig Thomas is spelled t-h-o-m-a-s Craig is spelled c-r-a-i-g; case number 47917955 - State versus Block News, Inc.; case number 47915227 and 28 - State versus Phillip Long; case number 47915205, 06 - State versus Block News, Inc.; case number 47934850 - State versus Debbra Redding; case number 47917860 - State versus David Stoughton; case number 47917859 - State versus 400 East Baltimore Street, Inc.; as well as the case number 47936103 - State versus Wooden. Now, these cases came before the Court on a special assignment request of Mr. Preves on March 24, 1980. At that time there was some discussion on the record. The case proceeded to a not guilty statement of facts. In essence, Mr. Preves and Mr. Sandler for the Defense made the record that they wished to make without the need for taking testimony after the defendants had respectfully waived their rights to a jury trial and to proceed with an actual trial before this Court. At the conclusion of that hearing, I asked nine specific questions which were in part related to a case that was pending in the Court of Special Appeals. That case was an appeal from a decision by Judge Malloy, State versus Gravett which was number 1193 in the September Term and in an unreported opinion, unreported per

curium opinion, the Court of Appeals decided the issue in that case on the narrow procedural point and did not reach many of the substantive issues which were in fact before me here. The case of the Court of Special Appeals was filed on May 12th, 1980. Mr. Prevas provided me soon thereafter with a copy of that opinion together with a copy of the brief of the Attorney General and a copy of the brief of Mr. Sandler with respect to those cases sometime after May 12. An ambitious person employed by the State's Attorney's Office of Baltimore City apparently having something to do more with computers than with prosecution of cases insisted that this case be set in for this date even though counsel and I had agreed that some of these issues would be delayed pending adjudication by the Court of Appeals. Consequently, the cases were called and brought before the Court today. Now that many of the defendants have been assembled and Mr. Sandler and Mr. Prevas are here, we will hear argument on the points which I left open at the end of the last hearing. We will attempt to resolve some, perhaps all of the issues which are necessary for the determination of these cases. In brief, the first point which we will note in brief but perhaps at this point it should be made clear that on the statement of facts, Mr. Prevas, as put before the Court, purchases of the items which have been marked in evidence and which are now in their original wrappers again - the State's Exhibit One, State Exhibit Five, Mr. Prevas if I am not mis-

taken you indicated that at each of these bookstores these items were arrayed in displays and in many instances they were wrapped in cellophane. That the plainclothes officer had picked out items and taken them to the cash register and paid cash without discussion of the purpose for the purchase and upon making the purchase removed the items from the premises. With respect to certain of the instances, you indicated that some of these goods were visible from outside of the premises. The testimony was taken with respect to the employees and the corporations and finally Mr. Sandler I believe indicated that with respect to each and every defendant, if the officer would have indicated that he was not purchasing for governmental purposes, they would not have been sold. But, Mr. Sandler candidly admitted that the persons who were selling would not have volunteered the question. Mr. Sandler also added for the record that the signs which were depicted in Defendant's Exhibits One through Four, denominated as motions exhibits and which will be made now case exhibits, those signs were in place and that the material was purchased with governmental funds and that the police officers were acting as officers of the Baltimore City Police Department when in fact they made purchases. Now gentlemenm, without prejudice to what you actually said on the record last time but just for my purposes, did you in fact have any additional facts which are critical or which I should be apprised of at this time?

MR. PREVAS: I think the facts as Your Honor indicated them were the facts that we gave at that time and the State has nothing in addition.

THE COURT: Well, on the facts, I am sure, but I would like to hear something on argument. Mr. Sandler, do you have anything additionally on the facts?

MR. SANDLER: Just one comment, Your Honor, in connection with my candid admission that the clerks would not ask the question, I think that I qualified that by statement on the record that under the Section 422, they weren't required to do anymore that the signs - .

THE COURT: I understand your legal argument, but I think the fact was that they did not in fact inquire.

MR. SANDLER: At that point I believe you asked where the Court queried as to whether or not any of the clerks asked and I said based on my information they did not.

MR. PREVAS: Your Honor, before we proceed, just as a housekeeping matter let the record reflect that the five human defendants are in fact present in the court room and that the rule I believe, it is 723C does not require that the corporations be present although Mr. Sandler is acting as the representative for the corporation. So the record is clear we are not doing this in the absence of the defendants.

THE COURT: All right, I think the first question I asked was why I shouldn't follow Judge Malloy and I

cases before I left the Bench so that they would not be left dangling for my successor.

Do counsel want to say anything at this point at all before I go into the opinion?

MR. DIENER: No, your Honor.

THE COURT: On any point, procedural or otherwise?

MR. BASS: No. The State's is afraid -- nothing.

THE COURT: The State is afraid?

MR. BASS: Yes.

THE COURT: Why is the State afraid?

MR. BASS: We are here, your Honor, without a defendant being present. And I would like to strike that, we have nothing further to say. We are not afraid.

THE COURT: Mr. Diener?

MR. DIENER: Nothing to add.

THE COURT: Mr. Diener is put in the unfortunate situation of being called upon to sit in for Mr. Sandler, Mr. Sandler having made the argument to the Court in the prior hearings and supplementing these arguments with a letter to the Court dated July 31, 1980. A copy of that letter will be entered for the record in these cases at this time. Also for the record Mr. Preyas' submission of memorandum of Law and some case citations on obscenity will also be put in the record.

The key issue here is an interpretation of Section 423 of Article 27 of the Maryland Code. Section 423 of

Article 17 provides prohibitions and penalties imposed in this subtitle shall not extend to persons of bonafide scientific, educational, governmental or other similar justification for possessing such matter or distribution thereof pursuant to such justification. The cases here were tried on the theory that the obscenity of materials was assumed and that the defendants were, could not be found guilty of these charges because of the application of the exemption. The exemption was said to apply because as shown in Defendant's Exhibit 1, 2, 3 and 4, in the respective places of business signs appear which read "The customers agree that he or she is purchasing the material selected by him or her for their scientific, governmental, educational or other similar justification." We have had extensive argument on these points. Argument has been extensive but it has not been particularly illuminating because this exemption has not been the subject of the extensive litigation at the appellate level in any Court in this country. The case which defendants rely upon is a case decided by a Nisi Prius Court in the State of New York. That case which we have called through the course of these proceedings the Branch case decided that similar signs brought the defendants within the exemption and called for the exemption to be applicable so that the criminal penalties could not apply.

It is Mr. Sandler's contention as specifically set forth in his letter of July 3rd, which is being made a part of

this record, that Section 412c says what it says, that it shows the intention to distribute materials of an obscene nature only to persons with scientific, educational or governmental justification. He contends that the attempt to do this is made clear by the signs posted in the stores and therefore the silence on the part of the purchaser acknowledges his acceptance of the materials of the sale. That essentially is the reasoning of the Court in the Wrench case. The citation for Wrench is 371 N.Y. Supp. 2nd.,322, decision by the District Court of Suffolk County in New York.

After considerable consideration including the review of the Miller case and their progeny as well as other matters and other cases which have been cited to the Court in the various materials it is this Court's feeling that there is essentially little or no illumination of this exemption provision and the Court is left primarily to its own reasoning powers with respect to these cases and the application of this exemption provision. This Court finds that as the evidence demonstrated and as the agreed statement of facts indicated that the items sold were sold in cellophane covers were sexually explicit scenes depicted on the cover, that depiction is sufficient to place knowledge of the sellers that the material inside may be obscene. That doctrine has been recently reaffirmed in the case of United States vs. Grassi, 602F.2d 1192 (5th Circ.1979). That case however and other cases

dealing with knowledge of obscene materials is not really, does not really help the Court with respect to this exemption. If the Court were the State's attorney the Court would not be bringing these cases. For the record it is clear that these materials are being sold exclusively, or at least in all but one case, in zoning as the adult entertainment zone, which is a creature of City Ordinance for whatever adult entertainment might be.

The Court does not find that the person who enters the store is surprised to find what he finds there. In fact, the person who enters most likely enters willfully with a desire to be able to purchase that which is on sale. It appears to the Court, and if the Court were the State's Attorney, as long as these matters were maintained within the adult entertainment zone, a zone which the City Council has indicated should be for this type of entertainment, the prosecutions would be best deferred.

The Court does not however have the power to institute cases. It has only the power to adjudicate those cases which come before it and its opinion as to the value of the prosecution is not to be exercised in making its determination.

The issue boils down to whether these signs are sufficient to place the defendants in an exempt category without more. The Court finds that these signs do not so place

the defendants. It is perhaps foolish for the State to be prosecuting these cases arising out of the adult entertainment zone but it is equally foolish for the defendants, the Court believes, to claim that those people who enter are only entering for the purpose of buying these things for educational, scientific or governmental purposes. The troublesome part of it, of that conclusion, is that these cases were, these materials were in fact bought by the City Police Department for no other purpose than a governmental purpose, namely: The prosecution of these defendants. But as the Court understands it the exemption requires that the distribution, i.e. the sale be for the purpose of educational, scientific or governmental reasons and therefore the purchasers intent is pretty much immaterial.

The Court frankly believes that this case, these cases are worthy of appellate adjudication and that on review by an Appellate Court the signs may very well be considered to be sufficient. Without any guidance from an Appellate Court of this jurisdiction, however, this Court does not feel that the mere placing of signs is sufficient to place the defendants within the ambit of the exemption.

Now, Mr. Bass, is there an agreement as to disposition?

MR. BASS: Yes, your Honor. As your Honor knows I am standing in for John Prevas. Mr. Prevas instructed me yesterday that he had an agreement with Mr. Sandler that if your Honor did indeed rule in favor of the State on the

preliminary motions that --

THE COURT: They are not preliminary motions. There were motions made at the end of the trial too.

MR. BASS: That the State would recommend a $500 fine per charging document for each human and corporate defendant, no jail time and no probationary supervision. Mr. Pravas further stated that the statement of facts have already been given to your Honor.

THE COURT: That's correct.

MR. BASS: In terms of the trial so that all that was left for me to do today was just reiterate that was his agreement.

THE COURT: That is your understanding Mr. Diener?

MR. DIENER: As I read this agreement that was made between Mr. --

THE COURT: Is there a letter?

MR. BASS: Yes, I will make it a State Exhibit or Joint Exhibit.

THE COURT: May I have it?

The letter is dated March 17, 1980 addressed to me. Mr. Sandler is shown to have a copy of it. The pertinent part reads that if Mr. Sandler is not successful "he will proceed on argued statements of fact in each case with a binding recommendation of a $500 fine per charging document for each human and corporate defendant, no jail time, and no probationary

supervision."

I assume your office received a copy of that, Mr. Diener?

MR. DIENER: Yes, your Honor.

THE COURT: All right. Now, the imposition of the $500 fine will be applied to each case. However, the payment of the fine shall be stayed for a period of, until May 1, 1981. That should give it sufficient time to get to the Court of Special Appeals at least. Or if you need more time, let me know now.

MR. DIENER: Your Honor, we will be noting an appeal as soon as possible. That is what I understand from Mr. Sandler, that we will be noting an appeal as soon as possible and it depends on the courts.

THE COURT: Well, I should state for the record and perhaps you can make a note of this, Mr. Bass --

MR. BASS: Yes, sir.

THE COURT: That since I wouldn't be around to monitor it my successor may not be so inclined that it is my intention that no fines be paid in this case until every appellate avenue is exhausted up through and including the United States Supreme Court.

MR. BASS: That is understood, your Honor.

THE COURT: There being no further business, I take it, gentlemen, your clients are well aware of their rights of

appeal but I should state for the record that they have thirty days in which to appeal, in which to take an appeal, ninety days to ask for a reconsideration of sentance to whomever my successor may be. And counsel has already noted that an appeal will be taken promptly.

I assume all defendants are on personal recognizance?

MR. DINNER: I'm not sure.

THE COURT: Whatever recognizance and bond they are on it is to be maintained and continued, same provisions as with respect to the fine, namely that the bail or the personal recognizance should stay in effect until all appellate review of these cases has been exhausted up through and including the United States Supreme Court.

(Whereupon, the above letter was received and entered into evidence as Joint Exhibit Number 1.)

THE COURT: The Court stands adjourned.

(Conclusion of proceedings.)

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Statutory Provisions

Maryland Rules of Procedure:

Rule 1085. Scope of Review — Limited to Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.